TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 33

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLANTS

vs.

BALTIMORE AND OHIO RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

FILED MARCH 14, 1931

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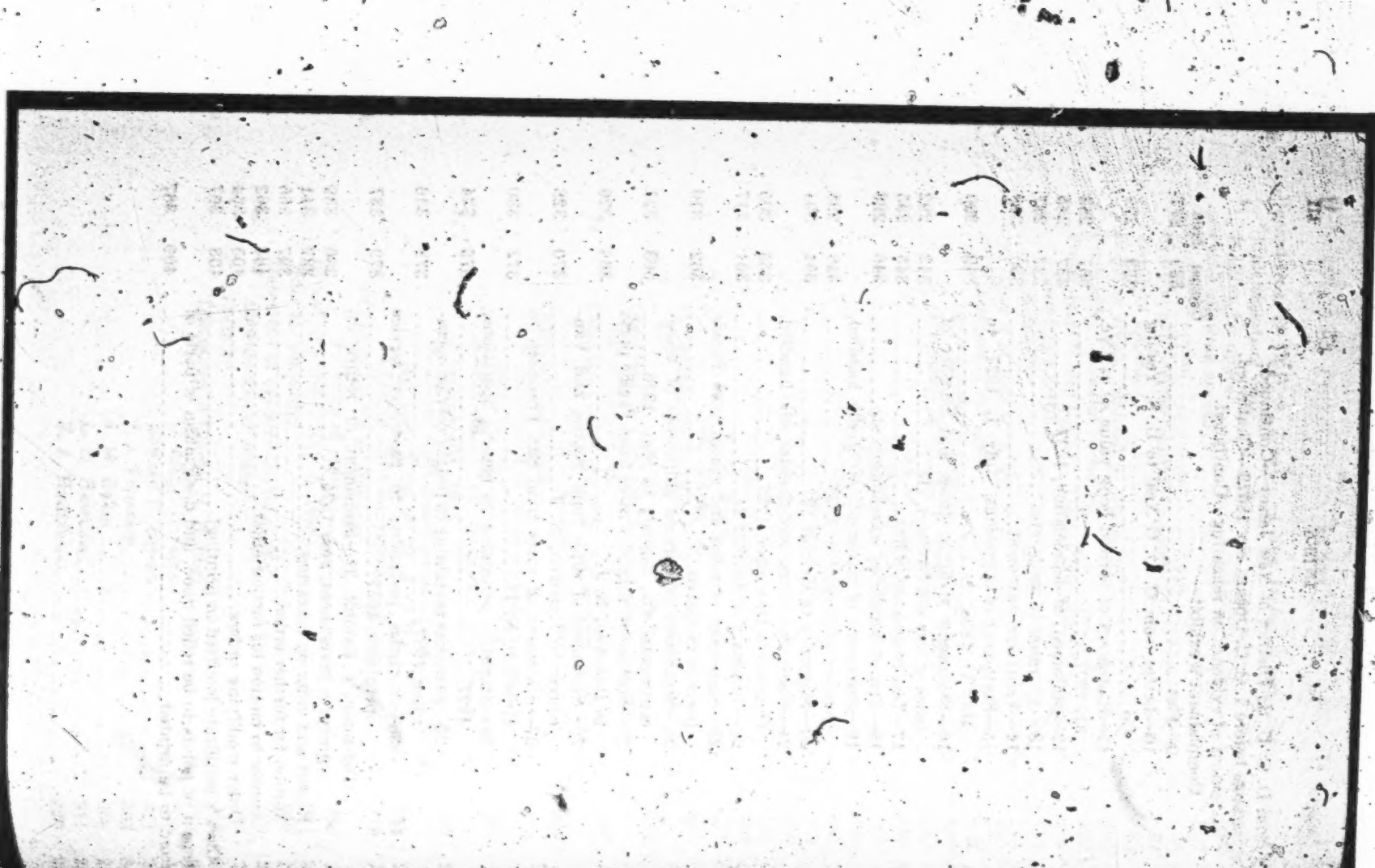

In United States District Court, District of New Jersey

BALTIMORE & OHIO R. R. Co.; CENTRAL R. R. Company of New Jersey; Cleveland, Cincinnati, Chicago, and St. Louis Ry. Co.; Delaware, Lackawanna & Western R. R. Co.; Erie R. R. Co.; Champlain & St. Lawrence R. R. Co. (Canadian National Ry. Co., lessee); United States & Canada R. R. Co. (Canadian National Ry. Co., lessee); Chicago, Detroit & Canada Grand Trunk Junction R. R. Co. (Canadian National Ry. Co., lessee); Detroit Grand Haven & Milwaukee Ry. Co; Cincinnati, Saginaw & Mackinaw Railroad Co. (Canadian National Ry. Co., lessee); Grand Trunk Western Ry. Co.; Michigan Air Line Railway; Toledo, Saginaw & Muskegon Ry. Co.; Illinois Central R. R. Co.; Lehigh Valley R. R. Co.; Michigan Central R. R. Co.; New York Central R. R. Co.; New York, Chicago & St. Louis R. R. Co.; New York, Ontario & Western Ry. Co.; Pennsylvania R. R. Co. and Wabash Ry. Co.; Canadian Pacific Ry. Co. and Canadian National Ry. Co.

vs.

UNITED STATES OF AMERICA, HOBOKEN MANUfacturers' R. R. Co., Intervenor; Interstate Commerce Commission, Intervenor

In equity, E–4011

Docket entries

Mar. 11,	1930.	Petition filed.
" "	"	Order to show cause why injunction should not issue filed.
" 31,	"	Answer of United States of America filed.
Apr. 21,	"	Petition of Hoboken Manufacturers' Railroad Co. filed.
" 22,	"	Order for leave to intervene filed.
May 20,	"	Answer of Hoboken Manufacturers' R. R. Co., intervenor, filed.
" 27,	"	Order for statutory court filed.
June 4,	"	Intervention of Interstate Commerce Commission filed.
" "	"	Answer of Interstate Commerce Commission filed.
June 17,	"	Hearing on motion for permanent injunction. Decision reserved (Judges Davis, Runyon, and Avis).
" "	"	Stipulation amending petition, adding parties plaintiffs, filed.
" "	"	Certified transcript of record before Interstate Commerce Commission filed.

Sept. 20,	1930.	Opinion filed (Judge Runyon).
Dec. 19,	"	Final decree for complainant, &c., filed.
Feb. 16,	1931.	Assignment of errors filed.
" "	"	Petition for appeal filed.
" "	"	Order allowing appeal filed.
" "	"	Notice to Attorney General filed.
" "	"	Citation issued.
" 17,	"	Notice of appeal filed.
" 18,	"	Citation returned, service acknowledged February 17th. Copy filed.
" "	"	Acknowledgment of service of order allowing appeal and assignment of errors filed.
" 25,	"	Bond on appeal filed.
Mar. 11,	"	Præcipe for transcript of record.
" 13,	"	Certified transcript of record forwarded to Clerk U. S. Supreme Court.

3 [Omitted.]

4 In United States District Court for the District of New Jersey

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IN EQUITY

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition

Filed Mar. 11, 1930

To the honorable judges of the District Court of the United States for the District of New Jersey:

The Baltimore & Ohio Railroad Company and other petitioners, hereinafter more fully described, bring this, their petition, against the United States of America, and more particularly to enjoin, set aside, suspend, and annul three certain orders of the Interstate Commerce Commission, and in support of their prayer for injunctive relief petitioners complain and say:

1. The petitioners herein are the following-named railroad corporations:

The Baltimore and Ohio Railroad Company, a corporation, incorporated under the laws of the State of Maryland.

The Central Railroad Company of New Jersey, a corporation, incorporated under the laws of the State of New Jersey.

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, a corporation, incorporated under the laws of the States of Ohio and Indiana.

The Delaware, Lackawanna & Western Railroad Company, a corporation organized and existing under the laws of the State of Pennsylvania.

The Erie Railroad Company, a corporation organized and existing under the laws of the State of New York.

The Champlain & St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), a corporation organized and existing under the laws of the State of New York.

The United States and Canada Railroad Company (Canadian National Railway Company, Lessee), a corporation organized and existing under the laws of the State of New York.

The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), a corporation organized and existing under the laws of the State of Michigan.

Detroit, Grand Haven and Milwaukee Railway Company, a corporation organized and existing under the laws of the State of Michigan.

Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee), a corporation organized and existing under the laws of the State of Michigan.

Grand Trunk Western Railway Company, a corporation organized and existing under the laws of the States of Michigan and Indiana.

The Michigan Air Line Railway, a corporation organized and existing under the laws of the State of Michigan.

Toledo, Saginaw & Muskegon Railway Company, a corporation organized and existing under the laws of the State of Michigan.

Illinois Central Railroad Company, a corporation organized and existing under the laws of the State of Illinois.

Lehigh Valley Railroad Company, a corporation organized and existing under the laws of the State of Pennsylvania.

The Michigan Central Railroad Company, a corporation organized and existing under the laws of the State of Michigan.

The New York Central Railroad Company, a corporation organized and existing under the laws of the States of Illinois, Indiana, New York, Ohio, and Pennsylvania.

The New York, Chicago & St. Louis Railroad Company, a corporation organized and existing under the laws of the States of New York, Ohio, Pennsylvania, Indiana, and Illinois.

New York, Ontario & Western Railway Company, a corporation organized and existing under the laws of the State of New York.

The Pennsylvania Railroad Company, a corporation organized and existing under the laws of the State of Pennsylvania.

Wabash Railway Company, a corporation organized and existing under the laws of the State of Indiana.

2. All of the aforesaid petitioners are common carriers engaged in the transportation of freight by railroad in interstate commerce, subject to the provisions of the interstate commerce act in so far as the same are constitutional and applicable, and as such common carriers, petitioners participate, inter alia, east of Chicago and Peoria, Illinois, and St. Louis, Missouri, and related gateways, in the transportation of silk, moving under joint through rates from certain Pacific coast ports to Hoboken, New Jersey.

3. The petitioner, or complainant, before the Interstate Commerce Commission in the proceeding out of which arose the particular orders which petitioners herein seek to have enjoined, set aside, suspended, and annulled, is Hoboken Manufacturers' Railroad Company, a corporation existing under the laws of the State of New Jersey, with its principal office located at Hoboken, Hudson County, in the said State of New Jersey, and likewise in the judicial district of the United States District Court for the District of New Jersey.

4. The jurisdiction of the court depends upon an act of Congress of October 22, 1913 (38 Stat. L., 219), providing for the institution of suits to suspend or set aside in whole or in part any order of the Interstate Commerce Commission, and upon the application of the Constitution of the United States and also under the general equity jurisdiction of this court.

5. On or about, to wit, August 6, 1926, Hoboken Manufacturers' Railroad Company, as petitioner, filed with the Interstate Commerce Commission, its complaint wherein it is alleged that the division accorded it out of the joint through rates applicable on shipments of silk from points on the Pacific coast to destinations on its line, was unjust and unreasonable, and prayed that the commission prescribe increased divisions. On or about November 5, 1927, said commission, acting through its division 1, issued its report and order, volume 132, Interstate Commerce Commission Reports, page 579, et seq., a true and correct copy of which report and order, marked "Exhibit A," is attached hereto and made a part hereof as fully as though set forth at length herein.

6. Subsequent thereto, on or about, to wit, May 14, 1928, following the announcement by the Supreme Court of the United States of its decision in Brimstone Railroad & Canal Co. v. United States, 276 U. S. 104, said Interstate Commerce Commission, of its own motion, reopened said proceeding in which there had already issued the report and order already described in the preceding paragraph hereof. Further hearing was held pursuant to said order reopening said proceeding, and thereafter, on or about, to wit, May 7, 1929, said Interstate Commerce Commission issued its further report

and order, volume 135, Interstate Commerce Commission Reports, 190, et seq., a true and correct copy of which report and order, marked "Exhibit B," is attached hereto and made a part hereof as fully as though set forth at length herein.

7. The said two orders of the Interstate Commerce Commission, Exhibits A and B, purport to require petitioners herein to accord and pay to Hoboken Manufacturers' Railroad Company, out of their portion of said joint transcontinental rates applicable on silk, and covering the transportation thereof east of Chicago and Peoria, Illinois, and St. Louis, Missouri, and related gateways, a division of twenty-two cents (22¢) per 100 pounds. The first of said orders required that said increased division of twenty-two cents (22¢) per 100 pounds be made effective as of August 6, 1926, the date when Hoboken Manufacturers' Railroad Company filed its complaint before said commission, and the second order directed the said increased division to be effective on and after December 5, 1927, and until the further order of said commission.

8. Petitioners aver that under the provisions of the Interstate Commerce Commission act, and particularly section 15, subparagraph 6 thereof, the Interstate Commerce Commission is authorized to prescribe divisions of joint rates, but that said authority and power vested in said commission operates solely in the future and has no retroactive effect, except in cases where the joint rate or charge was established pursuant to a finding or order of the commission. The east-bound joint transcontinental silk rates involved in the proceeding before said Interstate Commerce Commission, out of which said orders, Exhibits A and B, arose, have not at any time been established pursuant to any finding or order of said commission.

9. Petitioners aver that despite said lack of authority and power on the part of the said commission in connection with the particular matters before it out of which arose said orders, Exhibits A and B, said commission, in both of said orders, undertook to, and did, give retractive effect thereto. In the first order of November 5, 1927, said commission, acting through its division 1, concluded the same as follows:

"It is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission."

10. Petitioners aver that the commission's second order, dated May 7, 1929, Exhibit B, provided as follows:

"It is ordered, That the said order of November 5, 1927, be, and it is hereby, modified to read as follows:

"It is ordered, That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific

coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways.

"And it is further ordered that this order shall continue in force until the further order of the commission."

11. Subsequent thereto, on or about, to wit, January 6, 1930, Hoboken Manufacturers' Railroad Company, by supplemental petition, represented to the Interstate Commerce Commission that neither of its prior orders in this proceeding were being complied with by the carriers (petitioners herein); that petitioner was informed that court action to enjoin said orders was contemplated, and therefore prayed that the commission should cause to be issued a further order restricted solely to future shipments, the hope being expressed in said petition that then no further uncertainty would exist as to the payment of the increased division thereon, meanwhile permitting the rights of the parties respecting the shipments which have heretofore moved subsequent to December 5, 1927, to be adjudicated in connection with said contemplated court proceeding. Pursuant thereto, on or about, to wit, February 4, 1930, the commission issued its further order, a true and correct copy of which, marked "Exhibit C," is attached hereto, and made a part hereof, as fully as though set forth at length herein.

12. In said further or third order, Exhibit C, the Interstate Commerce Commission purports to make effective the said increased division of twenty-two (22¢) cents per one hundred (100) pounds above described on all shipments on and after March 10, 1930, and suspends the effective force of the preceding two orders of November 5, 1927, and May 7, 1929, only in so far as they would otherwise have purported to relate to shipments on and after said date of March 10, 1930.

13. Petitioners further aver that under the provisions of the Interstate Commerce Commission act, and particularly section 15, subparagraph 6, thereof, the commission, in prescribing and determining the division of joint rates, fares, and charges, is directed to give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers, and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier, of the joint rate, fare, or charge.

14. Petitioners aver that the evidence contained in the record before the Interstate Commerce Commission on which was based the

order of November 5, 1927, Exhibit A hereof, was restricted to the facts and circumstances immediately relating to the service performed by Hoboken Manufacturers' Railroad Company, the complainant before the commission, and included no facts or circumstances whatever in connection with any of the factors enumerated in said section 15, subparagraph 6, relative to the other carriers participating in said traffic.

15. Petitioners aver that in the said three orders of said commission, as is manifest from the facts herein alleged, and upon the effect of said reports and said three orders, the commission misconceived the meaning of, and misapplied, section 15 (6) of the Inter-
12 state Commerce Commission act, and that such misapplication of said section will result in a denial to petitioners of the rights guaranteed to them by the fifth amendment of the Constitution of the United States.

16. Petitioners aver that as to certain of the shipments heretofore made and still being made between the Pacific coast ports in question and Hoboken, New Jersey, part of the haul is performed in an adjacent foreign country, to wit, the Dominion of Canada, and that as to such traffic, said Interstate Commerce Commission is wholly without jurisdiction. Petitioners further aver that said orders of said commission, Exhibits A, B, and C, are illegal, defective, and invali din that they fail to exempt therefrom those silk shipments which are transported in part through said Dominion of Canada, and, as such, are not subject to the jurisdiction of said commission.

17. In addition to said lack of jurisdiction on the part of the Interstate Commerce Commission with respect to the shipments moving partly within the Dominion of Canada, and without waiving said jurisdictional objection, petitioners further aver that there is no testimony appearing in the record respecting the divisions applicable in connection with said shipments, to that portion of the haul performed within the United States and no testimony or finding as to how much of the increased division should be allocated to that portion of the haul within the United States and that portion of the haul within the Dominion of Canada. No differentiation appears, either in the record or the commission's findings and orders, either as to divisions or otherwise, between the portion of the service performed within the United States and that portion thereof per-
formed within the Dominion of Canada.

13 18. Petitioners aver that if they fail to comply with said orders of the Interstate Commerce Commission, they may be subject to prosecution and incur liability for penalties as against which liability your petitioners will not have adequate protection at law. On the other hand, if your petitioners, in order to avoid said liability for penalties, under duress, agree to and establish the increased division specified in the said orders of the commission, they will then be subject to the payment of such increased division and none other. The substitution of said increased division specified

in the commission's said orders for the division now in effect will result in substantial reductions in the revenues of your petitioners, and if, later, it shall finally be determined that said orders of the Interstate Commerce Commission were and are null and void, your petitioners will be without any means of collecting or receiving back the difference between said increased division prescribed by the commission and the present division, if pending such final determination, said orders of the commission become effective and your petitioners are required to establish the increased division therein specified. Your petitioners are informed and believe that since the hearings before the Interstate Commerce Commission in this proceeding, there has been a further movement of said traffic in the manner disclosed in the evidence in this case from western Pacific points to Hoboken, New Jersey, and that there will continue to be such movement in substantial volume. Therefore, if said orders of the Interstate Commerce Commission are not enjoined, set aside, suspended, and annulled and if pending final determination herein, their enforcement is not temporarily enjoined and suspended, your petitioners will suffer irreparable injury for which they will be without adequate remedy or protection at law.

14 19. Petitioners aver that the said orders of the Interstate Commerce Commission, Exhibits A, B, and C hereof, are null and void, and should be enjoined, set aside, suspended and annulled:

A. Because the first two of said orders, Exhibits A and B, are given retroactive effect in violation of the acts of Congress, and particularly the provisions of the Interstate Commerce Commission act restricting the commission's retroactive authority to those cases only where the joint rate has been previously determined by the commission;

B. Because said three orders, Exhibits A, B, and C, fail to exempt therefrom such of the shipments of silk as move partly through and within an adjacent foreign country, to wit, the Dominion of Canada, thereby causing said shipments, in their entirety, to be removed from the jurisdiction of said Interstate Commerce Commission.

C. Because the enforcement of said orders, Exhibits A, B, and C, would deprive petitioners of their property without due process of law, in violation of the fifth amendment to the Constitution of the United States.

Wherefore, your petitioners, being remediless in the premises, and, by the strict rules of the common law, if the enforcement of said orders of the commission are not stayed and enjoined, your petitioners will suffer irreparable damage, to the end that they may attain the relief to which they are entitled, your petitioners pray:

First, upon five (5) days' notice to the Interstate Commerce Commission and the Attorney General of the United States, as
15 provided in the statutes aforesaid, a hearing before three judges of this court, and, after such hearing, an interlocutory

injunction suspending and restraining the enforcement, operation and execution of said orders of the Interstate Commerce Commission of November 5, 1927, May 7, 1929, and February 4, 1930.

Second, a permanent injunction, decreeing that said orders of the commission of November 5, 1927, May 7, 1929, and February 4, 1930, be declared null and void and be set aside, annulled and suspended and their enforcement, execution, and operation be forever enjoined and that the commission and the petitioners before said commission be restrained from taking any steps or instituting or further prosecuting any proceeding to enforce the aforesaid orders or any of them.

Third, such other and further relief as may be proper in the premises.

Respectfully submitted.

HENRY S. DRINKER, Jr., Esq.,
DICKSON, BUTLER & McCOUCH,
1429 Walnut Street,
Solicitors for Petitioners.

FRANK BERGEN, Esq.,
Of Counsel.
Public Service Terminal Bldg., Newark, N. J.
Designated as resident counsel under Rule 3.

16 [Duly sworn to by *Harry Wilson;* jurat omitted in printing.]

17 *Exhibit A to petition*

Interstate Commerce Commission

No. 18672

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted July 14, 1927. Decided November 5, 1927

Division of joint rates accorded the Hoboken Manufacturers' Railroad Company on silk from points on the Pacific coast to destinations on its line found unjust and unreasonable. Just and reasonable division prescribed.

E. B. Collins for complainant and Secretary of War, intervener.
Willis T. Pierson, Marion B. Pierce and S. H. Gillette, for defendants.
James W. Carmalt, for United States Testing Company, and C. C. Habberstad, for Hoboken Chamber of Commerce, interveners.

REPORT OF THE COMMISSION

Division 1, Commissioners, LEWIS, MCMANAMY and TAYLOR.

By Division 1:

Exceptions were filed by the parties to the report proposed by the examiner, and the case was orally argued. Our conclusions differ from those recommended by him.

18 Complainant, Hoboken Manufacturers' Railroad Company, hereinafter called the Hoboken, a common carrier by railroad engaged in interstate commerce, by complaint filed August 6, 1926, alleges that the division of joint rates accorded to it on shipments of silk from points on the Pacific coast to destinations on its line is unjust and unreasonable. An increased division is sought.

The Hoboken is primarily a switching and terminal railroad located at Hoboken, N. J. Practically all of its revenues are derived from the performance of those services. Its operations extend over a distance of approximately one mile, exclusive of side and team tracks, from a point at Second Street to Eighteenth Street, where it has direct track connections and interchanges freight with the Erie Railroad Company. It also interchanges freight with other railroad companies through the Erie and over its own float bridge at Hoboken.

The silk under discussion moves in bales averaging approximately 133 pounds, in baggage cars in special solid trainloads at approximately passenger train time. The line-haul carriers, in addition to insuring themselves against loss, provide armed guards to protect the shipments enroute.

It moves at a transcontinental-any-quantity rate of $9 per 100 pounds. The carriers east of Chicago, Ill., receive 27.5 per cent of this rate, or $2.475, which is approximately 175 per cent of their first-class rate from Chicago to New York, N. Y. The Hoboken's division is 5.25 cents or the same as it ordinarily receives on less-than-carload freight.

When the silk arrives at the Erie connection notice is sent to the Hoboken. The Hoboken then clears its tracks and switches the silk to the warehouse of the United States Testing Company, hereinafter called the Testing Company, which is located at 15th Street and Park Avenue, for unloading. After unloading, the empty cars are promptly returned to the Erie.

19 Special armed guards are employed to protect the silk from theft while it is on the Hoboken until it is unloaded. The unloading is performed for the Hoboken by the Testing Company in whose warehouse the silk is stored for the period of free time or 48 hours. Delivery to the consignees is made by the Testing Company upon the order of the Hoboken.

Complainant undertakes to show the necessity for the additional expenses incurred in the handling of these shipments over those

quired on ordinary less-than-carload traffic. The high value of the silk necessitates the employment of guards who receive $5 per day or approximately 1.25 cents per 100 pounds. Complainant states that its warehouse is not adequate to store the silk nor is its labor sufficiently skilled to unload or otherwise handle it. For those reasons it is necessary to employ the Testing Company to unload, store, and deliver the silk to consignees.

The value also increases the risk in handling and correspondingly increases the liability for loss. For protection against losses which may and do occur it is necessary to reinsure the value of the silk at a cost of 1.50 cents for each $100 in value or approximately 11.25 cents per 100 pounds.

Complainant itemizes its total cost of handling this traffic as follows:

	Per car, dollars	Per ton, cents	Per 100 lbs., cents
Switching [1]	14.93	74.65	3.73
Terminal insurance	45	225	11.25
Policing	5	25	1.25
Unloading and delivering	24	120	6
Total cost	88.93	[2] 444.65	22.23

[1] Based on cost of handling one car for year 1925. [2] Cost based on loading of 40,000 pounds.

Complainant contends that its division should be not less than 25 cents per 100 pounds with a minimum of $25 per car. It insists that that division is reasonable considering the cost to the trunk-line carriers of terminal service for deliveries to New York as follows:

	Per ton
Floating	$2.50
Unloading and delivery	1.20
Insurance	2.25
Policing	.25
Cost per ton	6.20
Cost per car of 40,000 pounds	124.00
Cost per 100 pounds	.31

Defendants contend that the switching costs as given by complainant are of no probative value as they do not approximate the cost of the service. They state that as the average cost is determined by using the entire length of complainant's line it will not apply on this traffic which moves about two city blocks.

They show that the transcontinental insurance covers the silk for 48 hours after arrival at destination provided it is left in the cars. They contend therefore that there would be no necessity for terminal insurance if the silk were properly permitted to remain in the cars for that period. They state that the cost of policing is conjectural, speculative and unjustified.

Defendants further contend that there is no obligation on complainant to employ the Testing Company to unload, store and deliver the silk to consignees, and that the arrangement is economically unsound. They state that complainant should unload and store the silk in its warehouse with other less-than-carload freight and that would not be practicable then to leave it in the cars under transcontinental insurance until delivery to consignees or else to deliver it to the Testing Company as agent of the consignees, thus relieving itself of all liability.

21

Defendants west of Chicago urge that if any increase should be granted in the division it should not be apportioned to the lines west of Chicago, Peoria, St. Louis, and related gateways, explaining that the eastern carriers do not participate in the cost of terminal service on the Pacific coast. That request will not be granted.

The Testing Company and the Hoboken Chamber of Commerce appeared in support of complainant.

The costs of handling silk over that of handling other traffic as shown by complainant to be the cost of terminal insurance, policing, unloading, storing, and delivering. There can be no doubt of the increased risk in handling silk, and in the interest of efficient and economic operation the necessity for insurance and policing is obvious.

We find that on and since August 6, 1926, the division received by the Hoboken out of joint rates on silk from points on the Pacific coast to destinations upon its line was, is, and for the future will be unjust and unreasonable in that it was, is and for the future may be less than 22 cents per 100 pounds.

An appropriate order will be entered.

22

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the 5th day of November, A. D. 1927.

No. 18672

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY; THE Baltimore & Ohio Railroad Company; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company (H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago & Northwestern

Railway Company; The Chicago, Rock Island & Pacific Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Grand Trunk Railway System (Lines in the United States, East of the West Bank of the Detroit and St. Clair Rivers) comprised of: Canadian National Railway Company, The Champlain & St. Lawrence Railroad Company (Canadian National Railway Company, Lessee); The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee), Grand Trunk Railway System (Lines West of Detroit and St. Clair Rivers), comprised of: The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), Cincinnati, Saginaw & Mackinaw Railroad Company (Canadian National Railway Company, Lessee), Detroit, Grand Haven Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk-Milwaukee Car Ferry Company; The Michigan Air Line Railway; Toledo, Saginaw & Muskegon Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; The Michigan Central Railroad Company; Missouri Pacific Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York, Ontario & Western Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railway Company; and The Western Pacific Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, that of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant, at Hoboken, N. J., said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic.

And it is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission.

By the commission.

[SEAL.]

GEORGE B. MCGINTY,
Secretary.

24 *Exhibit B to petition*

Interstate Commerce Commission

No. 18672

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted March 6, 1929. Decided May 7, 1929

On rehearing, division of joint rates accorded the Hoboken Manufacturers' Railroad Company on silk from points on the Pacific coast to its line at Hoboken, N. J., found unjust, unreasonable, and inequitable. Just, reasonable, and equitable division prescribed. Findings in 132 I. C. C. 579 modified in part.

Parker McCollester, Lord, Day & Lord, and L. D. Hawkins for complainant.

Willis T. Pierson, Marion B. Pierce, J. M. Souby, J. N. Davis, P. F. Gault, R. S. Outlaw, H. C. Barron, and Elmer Westlake for defendants.

For other appearances see former report.

REPORT OF THE COMMISSION ON REHEARING

CAMPBELL, Commissioner:

In the original report, 132 I. C. C. 579, decided November 5, 1927, division 1 found that on and since August 6, 1926, the division received by complainant out of the joint rates on silk from points on the Pacific coast to destinations upon its line was, is, and for
25 the future would be unjust and unreasonable to the extent that it was, is, and for the future might be less than 22 cents per 100 pounds. Thereafter, defendants filed petitions for reargument and reconsideration. On February 28, 1928, the case of Brimstone R. R. Co. v. United States, 276 U. S. 104, hereinafter called the Brimstone case, was decided; and on May 14, 1928, upon our own motion we reopened the instant case for rehearing, which has been held. Exceptions to the report on rehearing proposed by the examiner were filed by complainant, and by defendants operating in central and trunk-line territories. Complainant replied to the exceptions of defendants, and the case was orally argued.

Complainant, Hoboken Manufacturers' Railroad, a corporation, is a common carrier by railroad subject to the interstate commerce act. By complaint filed August 6, 1926, it alleges that the division of joint rates accorded to it on shipments of silk from points on the Pacific coast to destinations on its line was and is unjust, unreasonable, and inequitable. An increased division is sought. Unless otherwise indicated, rates, costs, and divisions or allowances will be stated in amounts per 100 pounds.

Complainant's line is located in a highly developed industrial and warehouse district of Hoboken, N. J. Its operations extend over a distance of approximately 1.25 miles, exclusive of side and team tracks, from Second to Eighteenth Street, where it has direct track connections with the Erie Railroad. It also interchanges freight with other carriers in connection with the Erie and over its own float bridge at Hoboken. While complainant is engaged in a general railroad business, it is primarily a switching and terminal railroad. It owns locomotives and electric trucks, but no freight, baggage, or other cars. It was stipulated that complainant is efficiently managed and operated and that the transportation service rendered
96 by it is of such importance to the public as to make necessary its continued operation. These facts were likewise stipulated as to defendants.

A joint any-quantity rate of $9 is applicable on raw silk from the Pacific coast points to Hoboken, an average distance of 3,288 miles. The carriers east of Chicago, Ill., receive 27.5 per cent of this rate, or $2.475, for a haul of approximately 900 miles. This division is approximately 175 per cent of the first-class rate from Chicago to New York, N. Y. Complainant's division is 5.25 cents. It seeks a division of 25 cents with a minimum of $25 per car.

The United States Testing Company, hereinafter called the testing company, and the Hoboken Chamber of Commerce intervened in support of complainant.

During the period extending from January, 1924, through April, 1928, the value of raw silk ranged from $4.20 to $8.25 per pound. At the time of the first hearing herein in November, 1926, the average value was $6 per pound, and at the rehearing it was stipulated as being worth $5.24 per pound as of November, 1927.

The shipments are imported from the Orient through the ports of San Francisco, Calif., Seattle, Wash., and Vancouver, B. C., herein referred to as the Pacific coast points, from which they move all-rail in baggage or express cars to Hoboken. This all-rail movement is at passenger-train speed in special trainloads, averaging approximately 7 cars per train. Armed guards protect the shipments en route. In addition, the line-haul carriers carry insurance to indemnify themselves against loss. These precautions are deemed necessary because of the high value of this commodity and its consequent susceptibility to loss or pilferage.

In the first five months of 1928 complainant handled 278 cars of raw silk, and 167 cars in October, November, and December,
97 1927. These shipments averaged 40,000 pounds per car. Although moved in carloads, each car contains numerous consignments, the shipments last above referred to containing an average of 7.5 consignments per car. Each consignment averaged 38.8 bales, each bale weighing approximately 133 pounds. Complainant's service in this traffic, therefore, is that of a delivering carrier of less-than-carload freight. Under the circumstances it is the duty to provide a warehouse adequate for unloading, storing, and delivering these

shipments. Its own freight station is inadequate for the handling and unsafe for the storing of this traffic. Its financial condition would not permit it to build or purchase one. Accordingly, it entered into an arrangement with the testing company whereby the latter unloads and stores this traffic and delivers it to the consignee. Under this arrangement the silk is stored in the testing company's warehouse for the free-time period, after the expiration of which it is warehoused there at the expense of the consignee. About 80 per cent of these shipments are held the full free-time period before delivery to the consignee, which is only made by the testing company on order of complainant. No service is performed by the testing company for a consignee of raw silk until after delivery by complainant to the consignee.

Most of these shipments are received by complainant at its Erie connection, but a few are received at its float bridge. The shipments are usually received at the Erie connection in lots of from 1 to 6 cars. Upon arrival there notice is sent complainant, which then clears its track and switches the silk to the private side track at the testing company's warehouse for unloading. This sidetrack holds three cars, and the movement thereto is a distance of about two city blocks, or 850 feet. After unloading, the cars are returned promptly to the Erie. Armed guards are employed by complainant to protect the silk from the time it is received until it is unloaded into the warehouse. In addition, a watchman patrols the warehouse at night.

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Complainant contends that its present division for handling this traffic is not commensurate with the cost and value of the service performed; and that it needs additional revenues to pay its respective operating expenses, taxes, and a fair return on its railway property held for and used in the service of transportation. It claims a total value on property held for and used in the service of transportation of $2,152,611.17, of which $587,573.17 is the book value of road and equipment, and $1,565,038 is the value of land. A return of 5.75 per cent on this amount would be $123,775.14. The following table, taken from an exhibit of record, is a statement of railway revenues and expenditures of the Hoboken for the periods indicated:

	Six months ending December 31, 1927	Jan. 1, 1928, to May 31, 1928	Total July 1, 1927, to May 31, 1928
Railway oper. revenue	$180,919.92	$197,271.16	$378,191.08
Railway operg. expe	138,255.77	153,643.51	291,899.28
Net rev. from ry. oper	42,664.15	43,627.64	86,291.79
Railway tax accruals	24,302.74	20,008.10	44,310.84
Ry. oper. revenue	18,361.41	23,619.54	41,980.95
Non-operating income	1,060.37	1,033.04	2,093.41
Gross income	20,321.78	24,652.58	44,974.36
Deductions from gross inc	26,360.35	18,635.03	44,995.38
Net income	* 6,038.57	6,017.55	* 21.02

* Deficit.

The annual report made to us by complainant for the year 1927 shows that its net operating income for the year was 1.8 per
29 cent of its total investment in railroad property, the latter figure being shown as $1,095,593. A return of 5.75 per cent on this amount would be $62,996.60. For that year complainant reported a net railway operating income of $20,136, which after deductions left a deficit of $5,772. The net railway operating income of complainant was much lower than that of any defendants, except two of the western roads. The average return for 1925, 1926, and 1927, of the four defendants operating in trunk-line territory was 4.51 per cent, and that of the four defendant trunk-line carriers operating in central territory was 4.59 per cent. The following table, from an exhibit of record, shows what the financial condition and earnings would have been had the division in issue been 22 cents on and after November 1, 1927:

	Six months ending December 31, 1927	Jan. 1, 1928, to May 31, 1928	Total July 1, 1927, to May 31, 1928
Railway oper. revenue	$187,158.24	$214,276.49	$401,434.73
Railway operatg. expe	138,255.77	153,643.51	291,899.28
Net rev. from ry. o	48,902.47	60,632.98	109,535.45
Railway tax accruals	24,302.74	20,008.10	44,310.84
Ry. oper. revenue	24,599.73	40,624.88	65,224.61
Nonoperating income	1,960.37	1,033.04	2,993.41
Gross income	26,560.10	41,657.92	68,218.02
Deductions from gross inc	26,360.35	18,635.03	44,995.38
Net income	199.75	23,022.89	23,222.64

On freight other than raw silk complainant now receives 7.25 cents; at the time of the first hearing this division also was 5.25 cents. This increase is reflected in the earnings for 1927, shown above. The facts as set forth establish that complainant is in need of additional revenue, but it is not contended that the traffic under consideration should alone bear the needed increase.

30 Complainant instances rates of $1.50 and $1.60 on lemon and citrus fruits, and grapes, respectively, from points on the Pacific coast to Hoboken, which commodities require expedited service. Rates in two groups, on canned goods, wool, dry goods, butter and eggs, automobiles, fresh fish, meat, fruit, and numerous other commodities between points considered are shown to average, respectively, $1.626 and $1.70. The division accorded complainant out of the average rate of $1.626 is 4.4 per cent, as compared with 2.77 per cent from the rate on raw silk on the basis of the division sought, and 2.66 per cent under the division of 22 cents. Based on 44 per cent of the total rate of complainant's division on raw silk would be 39.6 cents. Under the average rate of $1.70 based on 40,000 pounds, the earnings per car are $680, out of which complainant receives $29, while under the rate on silk the car earnings are $3,600, and under the 22-cent division complainant would re-

ceive $88 per car. After allowing complainant a division of 2
cents, the revenue per car-mile to defendants under the rate on silk
would be $1.07, as contrasted with 51 cents, the highest revenue per
passenger car-mile received by any of defendants. The total cost
of handling the traffic under consideration, as itemized by com-
plainant, is as follows:

	Per car, dollars	Per ton, cents	Per 100 lbs. cents
Switching [1]	14.93	74.65	3.7
Terminal insurance	45.00	225.00	11.2
Policing	5.00	25.00	1.2
Unloading and delivering	24.00	120.00	6.0
Total cost	88.93	[2] 444.65	22.2

[1] Based on average cost of handling one car for year 1925.
[2] Based on loading of 40,000 pounds.

31 The switching cost is arrived at by dividing $187,710, the
total switching cost on complainant's line for 1925, by 12,566,
the total number of cars handled in switching movement. The
total switching cost, dropping the cents, is shown as follows: Rentals,
$30,998; taxes, $45,806; coal, $5,692; electric current, $3,934; repairs
to locomotives, $4,894; depreciation, $1,668; maintenance of way and
structure, $25,875; maintenance of equipment, $15,591; transporta-
tion, $8,846; and wages, $44,496. The total switching cost is shown
to be approximately the same for 1926 and 1927. Defendants con-
tend that some of the items used in arriving at the total switching
cost, such as rentals and electric current, have no relation to the
cost of the specific switching service performed on silk. On a
line such as complainant's, however, the specific cost of this switch-
ing movement on silk would not be an appreciable amount, if any,
below the cost of a switching movement over the entire line. More-
over, the haul of complainant on approximately 75 per cent of its
traffic is about the same as here involved.

The 6-cent item shown in the above table represents a charge of
4 cents for unloading and 2 cents for delivery, the amounts charged
complainant by the testing company for these services. The item
for policing is based on the cost of the services of one guard at $5
per day. The time required to unload depends on the number of
shipments, but four guards are usualy provided to protect the silk
during unloading.

The insurance policies placed by defendants on these shipments
contain the following provision: "In case of shipments to points
of destination other than New York, this insurance shall terminate
immediately upon discharge from railroad car at point of destina-
tion. If the car is not discharged within 48 hours after its
32 arrival, the assured will notify the insurance company and
pay additional premium thereon if required." Complainant
does not participate in the payment of this insurance. In order
to indemnify itself against loss complainant insures the silk for the

balance of the free time remaining between the time it is unloaded at the testing company's warehouse and delivery. This terminal insurance costs complainant 1.5 cents per $100 of value. The item of 11.25 cents for terminal insurance shown in the above table is based on a value of $300,000 for a 40,000-pound car, but under the values of $6 and $5.24 per pound, shown above, the cost would be $56 and $31.44 per car, and 9 and 7.86 cents, respectively. It is not contended that the insurance rate is excessive, but defendants take the position that this terminal insurance is unnecessary. They state that if complainant would leave the raw silk in the cars for the free-time period, any need of insurance would be obviated. In view of the susceptibility of raw silk to loss and the great risk involved, it seems advisable for complainant to insure itself against loss and to place this silk in an adequate and safe warehouse until delivery to consignee. These are elements to be considered in determining the division of the applicable rate.

The cost to the trunk-line carriers of terminal services for deliveries in New York is stated to be 31 cents per 100 pounds. This service includes floating, unloading and delivering, insurance, and policing. It covers the handling of freight in New York Harbor, in which the average movement is much longer than that here considered. The Erie receives 95 cents per car from its interchange with the West Shore at Weehawken, N. J., to the connection with complainant. The distance of this switching movement is much greater than the one here, but does not entail unloading, storing, or delivering.

33 The Jay Street Terminal at Brooklyn performs the floating operation between the Harismus Cove float bridges of the Pennsylvania and the former's terminal, 3 miles. The Bush Dock and the Bush Terminal, the New York Dock, and the Brooklyn Eastern District Terminal perform similar services. The allowance to these terminals, except the New York Dock, on all traffic except cordwood, grain, ice, coal, and coke in 6.5 cents and on cordwood, grain, and ice 6 cents. In New York Dock Ry. v. B. & O. R. R. Co., 39 I. C. C. 695, an allowance of 8 cents on carload traffic and 11 cents on less-than-carload traffic to the New York Docks, among others, was approved. In that case the rates to be divided were much lower than the one here. None of the above terminals handles silk.

The costs of handling raw silk over those of handling other traffic by complainant are shown to be in the cost of terminal insurance, policing, unloading, storing, and delivering. These do not include the cost of clerical work entailed in sending notices of arrival, collecting freight charges, and other similar work on this traffic.

Defendants west of the Chicago, Peoria, Ill., St. Louis, Mo., and related gateways request, if any increase in complainant's division is granted, that it be not apportioned to the lines west of those gateways. They point out that the eastern carriers do not participate in the cost of terminal service on the Pacific coast. We consider this to be a reasonable request.

The complaint herein was filed August 6, 1926, and the order is dated November 5, 1927. It provides that of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of the complainant at Hoboken, said complainant shall receive a division of 22 cents, which division shall be apportioned among all defendants which participate in the
34 revenues derived from this traffic; that the order shall take effect as of August 6, 1926, and shall continue in force until the further order of the commission.

It will be noted that the order prescribes a division from the date of the filing of the complaint, and for the future. The rate of which the division is here in issue was not "established pursuant to a finding or order of the commission," and under the holding in the Brimstone case, supra, the basis for retroactive application of the division is lacking. The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the act. By paragraph 2 of section 15 of the act "* * * all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, * * *." An order prescribing a division for the future is not an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927.

Defendants take the position that the facts to which we are required to give consideration under section 15(6) of the act were not present in the original record; that therefore, the original order herein was null and void; and that any order herein must speak from the date of a final decision upon the entire record. We do not agree with this contention. The former finding as to the future division is amply supported by the evidence upon the original record.

We find that on and since December 5, 1927, the division received by complainant out of joint rates on silk from points on the Pacific coast to Hoboken, N. J., on its line has been, is, and for the
35 future will be unjust, unreasonable, and inequitable to the extent that it has been, is, or may be less than 22 cents per 100 pounds.

An appropriate order will be entered modifying the order herein of November 5, 1927, to the extent indicated.

BRAINERD, Commissioner, concurring in part:

I concur in the majority's report herein. However, I am unable to approve the order proposed to be entered. There is no finding in the report in regard to the reasonableness of the divisions east and west of Chicago, Peoria, St. Louis, and related gateways, although they are collaterally brought in issue by the western lines. The proposed order directs that the complainant's division fixed at 22 cents

per 100 pounds "shall be apportioned among all the defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways." I find nothing in the report to support this clause in the order.

PORTER, Commissioner, concurring in part:

I concur in the finding that 22 cents would be a just, reasonable, and equitable division to complainant, but on this record I can not concur in the conclusion that the increased division to complainant should be paid by the defendants east of Chicago, Peoria, and St. Louis from the divisions received by them. The evidence as to the divisions accorded those defendants is extremely meagre and certainly not convincing that the balance remaining to them after paying from their divisions the increased division to complainant will be just, reasonable, and equitable as required by the statute. On this point the Brimstone case referred to by the majority would seem to be controlling.

86 In Erie Railroad Co. v. A. & V. Ry. Co., 98 I. C. C. 268, division 4 prescribed an increased division to the Erie for delivery at its Duane Street station in New York on fruit from the Pacific coast and provided that that increase should be deducted from the through rate prior to the distribution of 72.5 and 27.5 per cent to carriers west and east of Chicago, respectively. While that case is not controlling, it does indicate that if we had the full facts before us here we might find that the increase in the division to the Hoboken should not be borne entirely by defendants east of Chicago, Peoria, and St. Louis. In Artemus Jellico R. R. Co. v. L. & N. R. R. Co., 132 I. C. C. 183, division 3 prescribed an increased division to the complainant there, but refused to find by what defendants the increase should be paid, saying:

"The Baltimore & Ohio Railroad, and certain of its affiliated lines, excepted to the examiner's report because it did not find that defendant (L. & N.) must absorb out of its earnings all of the increase in divisions which the examiner proposed be accorded complainant on traffic destined to points north of the Ohio River. The only testimony offered with regard to divisions between defendants was that of a witness for the lines which filed the exceptions. From this testimony it appears that under the bases of divisions between carriers north of the river, on the one hand, and those south of the river, on the other, it has been the practice for the former to absorb any changes in divisions of lateral lines north of the river and for the latter similarly to absorb any changes in divisions of lateral lines south thereof. Although it would appear proper from the record as it now stands that the increase accorded complainant should be absorbed by defendant, the record is not sufficiently developed
87 to justify a definite finding on that question. How the decreased earnings of defendants shall be divided is therefore left for agreement among themselves, failing which appropriate petition may be filed with us."

On the record as it now stands I think a similar course to that followed in the case last cited should be followed here.

I am authorized to say that Commissioners Aitchison and McManamy concur in this expression.

38 ORDER

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 7th day of May, A. D. 1929

No. 18672

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE Baltimore and Ohio Railroad Company; Canadina Pacific Railway Company; The Central Railroad Company of New Jersey; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee and St. Paul Railway Company and H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago and Northwestern Railway Company; The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Canadian National Railway Company; The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), Cincinnati Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee), Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk-Milwaukee Car Ferry Company; The Michigan Air Line Railway; Toledo, Saginaw and Muskegon Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; The Michigan Central Railroad Company; Missouri Pacific Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York, Ontario and Western Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railway Company; and The Western Pacific Railroad Company.

39

It appearing that on November 5, 1927, division 1 entered its report and order in the above-entitled proceeding, and that on May 14, 1928, this case was reopened for rehearing.

It further appearing that such rehearing has been had, and that the commission on the date hereof has made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report and the report and order of November 5, 1927, are hereby referred to and made a part hereof.

It is ordered that the said order of November 5, 1927, be and it is hereby modified to read as follows:

It is ordered that on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways.

40 And it is further ordered, that this order shall continue in force until the further order of the commission.

By the commission.

GEORGE B. McGINTY,
Secretary.

[SEAL.]

41 *Exhibit C to petition*

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of February, A. D. 1930

No. 18672

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY; THE Baltimore and Ohio Railroad Company; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee and St. Paul Railway Company and H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago and North Western Railway Company; The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Canadian National Railway Company; The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee); The

United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee); Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee); Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk Milwaukee Car Ferry Company; The Michigan Air Line Railway; Toledo, Saginaw and Muskegon Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; The Michigan Central Railroad Company; Missouri Pacific Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York, Ontario and Western Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railway Company; and The Western Pacific Railroad Company.

42

Upon consideration of the complainant's motion for a further order and of the defendants' answer thereto, and upon further consideration of the record in the above-entitled proceeding.

It appearing, that on November 5, 1927, division 1 entered its report and order in the above-entitled proceeding, and that on May 14, 1928, this case was reopened for rehearing;

It further appearing, that such rehearing has been had and that the commission on May 7, 1929, made and filed a report on rehearing containing its findings of fact and conclusions thereon, and entered its order modifying in certain respects its said order of November 5, 1927, which said reports of November 5, 1927, and May 7, 1929, are hereby referred to and made a part hereof;

It is ordered, that on and after March 10, 1930, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways.

43

It is further ordered, that this order shall continue in force until the further order of the commission.

And it is further ordered, that the aforesaid orders of November 5, 1927, and May 7, 1929, be and they are hereby modified so as not to apply to the division of said rates on shipments delivered to and transported by said complainant on and after March 10, 1930, but this order shall not be construed as modifying, amending, or rescinding said orders of November 5, 1927, and May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to March 10, 1930, or with

respect to the division of rates on any shipments delivered to or transported by complainant prior to said date.

By the commission:

[SEAL.] GEORGE B. McGINTY,
Secretary.

In United States District Court

[Title omitted.]

Order to show cause

Filed Mar. 11, 1930

Whereas in the above-entitled suit application has been made to the undersigned, a district judge of the United States for the third circuit, for an injunction suspending and restraining the enforcement, operation, and execution of and setting aside of three certain orders made by the Interstate Commerce Commission as of the dates of November 5, 1927, May 7, 1929, and February 4, 1930, and

Whereas a verified petition praying for a permanent injunction forever enjoining, setting aside, annulling, and suspending the enforcement, operation, and execution of said orders of the Interstate Commerce Commission as set forth in said petition has been duly filed with the clerk of United States Court for the District of New Jersey, and

Whereas it has been made to appear from said verified petition that the petitioner may be entitled to an injunction enjoining, suspending, and restraining the enforcement, operation, and execution of and setting aside said orders of the Interstate Commerce Commission as set forth in said petition, it is

Ordered, that the respondent herein, the United States of America, appear before the undersigned and two other judges
45 at least one of whom being a United States circuit judge, said judges having been called by the undersigned to his assistance to hear and determine said petition in accordance with the provisions of an act of Congress of October 22, 1913, at Trenton, New Jersey, on Monday, April 28, 1930, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, and then and there show cause before said court and judges so convoked or so called together why the injunction prayed for in said petition should not issue, and it is further

Ordered, that a copy of this order with the petition attached thereto be served upon the Attorney General of the United States and on the secretary or chief counsel of the Interstate Commerce Commission, and that notice of this hearing be served upon them at least five (5) days before said April 28, 1930, as by said statute made and provided.

WM. N. RUNYON,
United States District Judge.

Dated at Newark, N. J., this 11th day of March, 1930.

46 [File endorsement omitted.]

47 In United States District Court

[Title omitted.]

Answer of the United States of America

Filed Mar. 31, 1930

United States, respondent in the above-entitled case, for answer to the petition filed therein against it says:

I

United States admits for the purposes of this suit the allegations contained in the opening paragraph and paragraphs 1, 2, 3, and 4 of the petition, except that United States denies that the suit was commenced or can be maintained under the general equity powers of this court.

II

United States, for answer to paragraphs 5 to 19, both inclusive, of the petition, admits and alleges that the Interstate Commerce Commission made the reports and orders dated November 5, 1928, and May 7, 1929, and the order dated February 4, 1930, which reports and orders are mentioned in said paragraphs and annexed to and as a part of the petition as Exhibits A, B, and C, in a proceeding then pending before it entitled No. 18672, Hoboken Manufacturers' Railroad Company v. Atchison, Topeka & Santa Fe Railway Company, et al.; and for full, complete, and accurate information concerning the contents of said reports and orders, and

48 for a description of the proceedings before said commission upon which the reports and orders were and are based, the court is respectfully referred to the text thereof, contained in said exhibits.

United States further alleges that at the hearings referred to in said paragraph, the commission accorded to all interested parties, including petitioners herein, a full and fair opportunity to be heard; that at said hearings a large volume of testimony and other evidence bearing upon said matters was submitted to the commission for consideration on behalf of said parties; that at said hearings and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the commission for determination on behalf of said parties by their respective counsel, whereupon the commission determined said matters and made and entered said reports and orders, which include the commission's findings of fact, decisions, conclusions, and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said reports, the commission made the findings and stated the conclusions upon which said orders are based.

United States further alleges that the findings and conclusions in said reports were and are fully supported and justified by the evidence submitted to the commission in said proceedings.

United States further alleges that in making said orders, the commission did not act arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support them; and that in making said orders, the commission did not exceed the authority which had been duly conferred upon it, and United States denies each and every allegation to the contrary contained in the petition.

Further answering the allegations of said paragraphs, United States denies that said orders are illegal, defective, invalid, null or void for the reasons set forth and alleged in those paragraphs, or for any other reason or reasons; and United States particularly denies that enforcement of said orders will cause petitioners to suffer irreparable injury or other legal damage.

III

Except as herein expressly admitted, United States denies the truth of each and every allegation contained in the petition in so far as they conflict with the allegations herein or with the statements or conclusions of fact included in said reports and orders, which are hereby referred to and made a part hereof.

Wherefore, having fully answered, United States prays that the relief sought be denied and the petition dismissed with costs to the petitioners, and for such other orders or decrees as to the court may seem just and proper.

KIMER B. COLLINS,
Special Assistant to the Attorney General.

JOHN LORD O'BRIAN,
Assistant to the Attorney General.

PHILIP FORMAN,
United States Attorney.

[*Duly sworn to by Elmer B. Collins; jurat omitted in printing.*]

In United States District Court

[Title omitted.]

Petition of Hoboken Manufacturers' Railroad Company for leave to intervene

Filed April 21, 1930

To the honorable judges of the District Court of the United States for the District of New Jersey:

The petition of Hoboken Manufacturers' Railroad Company respectfully shows:

1. Petitioner is a corporation organized and existing under the laws of the State of New Jersey, with its principal office at Hoboken,

N. J., and is engaged in business as a common carrier of freight by railroad in interstate commerce subject to the interstate commerce act (34 Stat. L, 584) and acts amendatory thereof and supplementary thereto.

II. The suit having the caption above stated, in which petitioner desires to intervene, is a suit brought under the provisions of an act of Congress of October 22, 1913 (38 Stat. L. 219), to suspend or set aside in whole or in part certain orders of the Interstate
52 Commerce Commission referred to and described in the petition of the petitioners in said suit.

III. Petitioner Hoboken Manufacturers' Railroad Company was a party in interest to the proceeding before the Interstate Commerce Commission in which said orders were made and has an interest in this suit in that said orders were made by the Interstate Commerce Commission in a proceeding before it upon the complaint of said petitioner Hoboken Manufacturers' Railroad Company and were and are for the benefit of said petitioner and direct that said Hoboken Manufacturers' Railroad Company shall receive an increased division of 22 cents out of the joint eastbound transcontinental rate on silk from points on the Pacific coast to destinations on the line of petitioner.

IV. Section 212 of the Judicial Code provides in part "that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party."

V. Your petitioner desires to intervene and join in said suit in opposition to the prayer of the petition and in support of the validity of the orders of the Interstate Commerce Commission whose suspension or annulment is sought.

53 Wherefore your petitioner prays that an order may be entered allowing your petitioner to intervene in said suit as an additional party defendant in the same and for such other and further relief in the premises as may be just, and your petitioner will ever pray, etc.

PARKER McCOLLESTER,
Solicitor for Petitioner,
26 Broadway, New York, N. Y.

PITNEY, HARDIN & SKINNER,
763 Broad Street, Newark, N. J.,
Of Counsel.

Designated as resident counsel under rule 8.

[*Duly sworn to by Wm. L. Diener; jurat omitted in printing.*]

54 [File endorsement omitted.]

In United States District Court

[Title omitted.]

Order granting leave to intervene

Filed April 22, 1930

This case coming on to be heard on the motion of Hoboken Manufacturers' Railroad Company for leave to intervene herein, and the parties hereto having indicated their assent to such intervention,

It is now ordered and decreed as follows, until the further order of the court:

The motion for leave to intervene be, and the same hereby is, granted and said petitioner has leave to intervene in this suit for its own interest, with the right to be made an additional party defendant to the case, and to appear by counsel and to answer the petition.

Dated April 22, 1930.

JOHN BOYD AVIS,
U. S. D. J.

We consent to the intervention of Hoboken Manufacturers' Railroad Company and to the entry of the above order.

HENRY S. DRINKER, JR.,
Solicitor for Petitioners.
ELMER B. COLLINS,
Solicitor for Respondent.

[File endorsement omitted.]

Equity E–1011 in United States District Court

[Title omitted.]

Answer of intervener

Hoboken Manufacturers' Railroad Company

Filed May 20, 1931

Answering the petition of the petitioners in this suit, intervener Hoboken Manufacturers' Railroad Company says as follows:

I. It admits the allegations of articles 1, 2, 3, and 4 of the petition.

II. Answering the allegations of article 5 of the petition, intervener denies that petitioners have a cause of action under the statutes therein referred to, under the Constitution of the United States or the general equity jurisdiction of this court, but admits that the statute aforesaid provides for suits to suspend or set aside in whole or in part orders of the Interstate Commerce Commission.

III. Answering the allegation of article 6, it admits that by an order dated May 14, 1928, the commission reopened the proceeding before it, but for a more complete statement of the proceedings avers that following the issuance by the commission of its report and order of November 5, 1927, petitioners herein and the
58 other carriers defendants in this proceeding before the commission filed petitions with the commission praying a reopening and further hearing therein. Intervener admits the remaining allegations of article 6.

IV. It admits that the commission made the orders referred to in article 7 of the petition and avers that the order of the commission therein referred to as Exhibit B was an order by way of correction or modification of the first order of the commission referred to as Exhibit A, and that with respect to the effective date of said order it merely changed the first order, Exhibit A, to become effective 30 days after its date, to wit, on December 5, 1927.

V. Answering the allegations of article 8 of the petition, intervener admits that under section 15, subparagraph 6, of the interstate commerce act, the Interstate Commerce Commission is authorized to prescribe divisions of joint rates, but denies that said article 8 correctly states the purport of said provision of the interstate commerce act and of the authority of the commission thereunder, and refers to the statute for a full and accurate statement of its provisions. Intervener admits that the joint transcontinental silk rate involved in the proceeding before the Interstate Commerce Commission in which said orders, Exhibits A and B, were made, were not established pursuant to any finding or order of said commission specifically prescribed said joint rates but were voluntarily established and maintained by petitioners herein and other carriers participating in the through transportation of silk shipments.

59 VI. Answering article 9 of the petition, intervener admits that the order of the commission of November 5, 1927, as originally issued contained the clause quoted in said article 9 and that so much of said order as provided that it should "take effect as of August 6, 1926," was beyond the authority and power of the commission and was void. Intervener avers, however, that in other respects said order of November 5, 1927, was a valid order and that as modified by said order of May 7, 1929, it took effect as of December 5, 1927. Intervener further avers that if said order of November 5, 1927, was not modified by the order of May 7, 1929, then under the terms and provisions of the interstate commerce act said order took effect thirty days after its issuance, and was in full force and effect on December 5, 1927, until thereafter modified by a subsequent valid order of the commission.

VII. Answering article 10 of the petition, intervener admits that the commission's order of May 7, 1929, contained the provisions therein quoted, and denies that the commission was without power

and authority to make said order or by said order to modify its first order of November 5, 1927, in the manner therein stated. Intervener further avers that if, as it denies, the commission was without power by its order of May 7, 1929, to modify its order of November 5, 1927, as of December 5, 1927, then said order of May 7, 1929, became effective as a modification of said order of November 5, 1927, thirty days from its date, to wit, June 7, 1929.

60 VIII. Intervener admits the allegations of articles 11 and 12 of the petition.

IX. Answering article 13, intervener admits that said article correctly states the substance of a portion of section 15, subparagraph 6, of the interstate commerce act, but for a full and complete statement of the provisions of said section, refers to the section of the act itself.

X. Intervener denies each and every allegation of articles 14 and 15 of the petition.

XI. Intervener denies each and every allegation of article 16 except that it admits that certain shipments heretofore have been made between Pacific coast ports and Hoboken, N. J., as to which part of the haul is performed in the Dominion of Canada.

XII. Further answering the allegations of article 16 of the petition, intervener alleges that with respect to shipments transported in part through the Dominion of Canada petitioners and their western connections have not established by publishing in tariffs filed with the Interstate Commerce Commission as required by the interstate commerce act, rates applicable to shipments of silk from the Pacific coast covering the portion of the through transportation of such shipments performed entirely within the United States, and have not stated in the tariffs naming the joint through rates on silk from the Pacific coast to Hoboken the portions of such rates covering the transportation performed within the boundaries of the United States, but have voluntarily established and maintained joint through rates for the entire through transportation, including the part thereof

61 performed in Canada. Intervener further alleges that with full knowledge of intervener's right under the interstate commerce act to receive a just and equitable division of any joint rate published by them in which intervener participates, said petitioners and their western connections have used the powers of attorney or concurrences given to them by the intervener to publish and maintain joint through rates for transportation from the Pacific coast, including transportation over routes through Canada, and in such publication have failed to publish rates for the portion of the transportation through Canada taking place entirely within the United States.

XIII. Further answering the allegations of article 16 of the petition, intervener alleges that petitioners and their connections who were defendants in the proceeding before the Interstate Commerce Commission appeared before the Interstate Commerce Commission, and although the proceeding was twice heard and argued

before the Interstate Commerce Commission, did not in such proceeding raise any objection to the jurisdiction or authority of the Interstate Commerce Commission to determine the division to be received by intervener out of said joint rates in the case of shipments transported through Canada but submitted to the commission the question of the division to be received by intervener on all shipments of silk transported by it.

XIV. Intervener admits the allegations of article 17 of the petition except the reference to the Interstate Commerce Commission's alleged lack of jurisdiction with respect to shipments moving partly within the Dominion of Canada and avers further that in the proceedings before the commission no evidence was produced
62 by petitioners or other defendants before the commission to show any different circumstances surrounding the portion of the transportation in Canada from the portion of the transportation in the United States, although the petitioners herein and the other defendants before the commission had ample opportunity to produce such evidence.

XV. Further answering the allegations of articles 16 and 17 of the petition, intervener further alleges that the transportation service performed by it is the same in the case of shipments which may previously have been transported partly within the Dominion of Canada as in the case of shipments transported entirely within the United States, and that the joint through rate applicable to both sorts of shipments was and is the same, and avers that there is no ground in the record or otherwise for a different determination as to the division to be received by intervener in the case of shipments which may have been transported through Canada than in the case of shipments transported entirely within the United States.

XVI. Answering article 18 of the petition, intervener denies that petitioners will suffer irreparable injury or are entitled to a temporary injunction for the reasons therein stated. Intervener further avers that if the enforcement of said orders of the commission of November 5, 1927, May 7, 1929, and February 4, 1930, is temporarily enjoined or suspended, intervener will be deprived of the benefit of said orders on shipments which have been transported or may be transported during the pendency of this proceeding or of said interlocutory injunction, and in the event the said orders of the commission are finally held valid and a permanent injunction is denied,
63 will be without remedy to recover the divisions to which it is and may be entitled on said shipments. On the other hand, if an interlocutory injunction is denied and petitioners are compelled to comply with said orders of the Interstate Commerce Commission and pay to petitioners the divisions therein prescribed during the pendency of this proceeding, then in the event the said orders of the commission are declared invalid, the petitioners will

have simple relief through an order of restitution or otherwise requiring intervener to restore to petitioners the amounts paid to the intervener by petitioners in compliance with said orders.

XVII. Intervener denies each and every allegation of article 19 of the petition.

XVIII. Further answering the allegations of the petition, intervener alleges that petitioners during the entire period from November 5, 1927, to and including March 10, 1930, failed and refused to comply with the said orders of the Interstate Commerce Commission and have maintained an unjust and unreasonable basis for the division of said joint through rate on silk with intervener, in violation of section 1 of the interstate commerce act; that in violation of said section they have failed and refused to accord to and pay to intervener a just, reasonable, and adequate division of said rate; that the Interstate Commerce Commission, after hearing held in accordance with the provisions of the interstate commerce act, found and determined that the petitioners were and would be violating the act in these respects, to the extent that they were and should be maintaining a basis of divisions of said joint through rates according to intervener less than 22 cents per 100 pounds for its portion of the through transportation, and embodied its findings and determination in re-
64 ports published as provided in section 14 of the interstate commerce act; that said findings and determination were and are valid regardless of the validity of the orders of the commission described in the petition; that said orders whose enforcement is here sought to be enjoined were issued for the purpose of requiring compliance with the act and preventing further violation thereof; and intervener therefore avers that petitioners are not entitled to the aid of this court to restrain and enjoin the enforcement of said orders of the commission, since this will have the effect of permitting petitioners to continue to violate the law in the respects indicated, by maintaining an unlawful basis of divisions and by withholding from intervener the division to which it is lawfully entitled on all shipments transported by it on and after December 5, 1927.

XIX. Further answering the allegations of the petition, intervener denies that the said orders of the Interstate Commerce Commission are illegal, defective, invalid, or null and void for the reasons set forth and alleged in the petition or for any other reason, and denies that the enforcement of said orders will cause petitioners to suffer irreparable injury or other legal damage.

XX. Except as expressly admitted in this answer, intervener denies the truth of each and every allegation contained in the petition, and so far as said allegations conflict with the allegations herein or with statements or conclusions of fact included in the reports and orders of the Interstate Commerce Commission referred to in the petition.

65 Wherefore intervener, having fully answered, prays that the relief sought by petitioner be denied, and that the petition be dismissed with costs to the respondents; and intervener prays for such other orders or decrees as to the court shall seem proper.

PARKER MCCOLLESTER,
LORD, DAY & LORD,
Solicitors for Hoboken Manufacturers' Railroad Company, Intervener Respondent,
95 Broadway, New York, N. Y.

PITNEY, HARDIN & SKINNER,
763 Broad Street, Newark, N. J.,
Of Counsel.

66 [*Duly sworn to by Wm. L. Diener; jurat omitted in printing.*]

67 [File endorsement omitted.]

68 In United States District Court

[Title omitted.]

Intervention of Interstate Commerce Commission

Filed June 4, 1930

To the honorable judges of said court:

In accordance with the provisions of section 212 of the Judicial Code, 36 Stat. L. 1150 (section 45a, Title 28, U. S. Code, Supplement III), we hereby enter the appearance of the Interstate Commerce Commission as a party respondent, and of ourself as its counsel, in the above-entitled suit.

DANIEL W. KNOWLTON,
Chief Counsel.
J. STANLEY PAYNE,
Assistant Chief Counsel.

69 In United States District Court

[Title omitted.]

Answer of Interstate Commerce Commission

Filed June 4, 1930

The Interstate Commerce Commission, hereinafter called the commission, intervening respondent in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petition contained, for answer thereunto, or unto

much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraphs 1, 2, 3, and 4 of the petition, the commission admits for the purposes of this suit that the allegations therein contained are true, except that it denies that the suit was commenced or may be maintained under the general equity jurisdiction of the district court, as alleged in paragraph 4.

70

II

Answering paragraphs 5 to 13, both inclusive, of the petition, the commission admits and alleges that it made the reports and orders dated November 5, 1927, and May 7, 1929, referred to in paragraphs 5 and 6, respectively, of the petition, and the order dated February 4, 1930, referred to in paragraph 11 of the petition, in a proceeding entitled Hoboken Manufacturers' Railroad Company v. Atchison, Topeka & Santa Fe Railway Company et al., Docket No. 18672, in which the question presented to the commission was whether the division of 5¼ cents per 100 pounds accorded by petitioners and other carriers defendants in said proceeding to complainant Hoboken Manufacturers' Railroad Company out of the joint rates on silk, amounting in each instance to $9.00 per 100 pounds, from ports of import on the Pacific coast to Hoboken, New Jersey, was unjust, unreasonable, or inequitable, in violation of section 1 (4) of the interstate commerce act; that said report dated November 5, 1927, is published at 132 I. C. C. 579, and said report dated May 7, 1929, is published at 155 I. C. C. 330; that the commission refers the court to the context of said reports and orders for full, complete, and accurate information concerning the contents of said reports and orders, and for a full description of the proceedings before the commission upon which said reports and orders were and are based; that in said proceeding the commission accorded to petitioners the full hearing provided for in section 15 (6) of the interstate commerce act, and in said hearing a large volume of testimony and other evidence bearing upon the matters covered by said reports and orders was submitted to the commission for consideration, including testimony and other evidence submitted on behalf of the petitioners by their counsel; that in said hearings and subsequently, both orally and in briefs
71 filed in said proceeding, questions relating to said matters were fully argued and submitted to the commission for determination, whereupon the commission determined said matters and entered and served upon the parties to said proceeding, including the petitioners, said reports and orders; that said reports and orders included the commission's findings of fact, decisions, conclusions, orders, and requirements in the premises, and that upon the evidence aforesaid,

the commission made the findings and stated the conclusions upon which said orders are based.

The commission further alleges that said orders were not made or entered either arbitrarily or unjustly, or contrary to the relevant evidence or without evidence to support them, and the commission denies each of and all the allegations to the contrary contained in the bill of complaint.

III

Further answering paragraph 9 of the petition, the commission admits that said joint rates of $9.00 per 100 pounds, of which the division was in issue before the commission, were not established pursuant to a finding or order of the commission, and that, therefore, under the decision of the Supreme Court in Brimstone R. R. Co. v. United States, 276 U. S. 104, said order of November 5, 1927, in so far as it attempted to prescribe a retroactive adjustment, was beyond its jurisdiction, but the commission alleges that said order of November 5, 1927, was and is valid in so far as it prescribed a future adjustment, and that although it could not lawfully become effective retroactively, it could and did lawfully become effective thirty days after its issuance, or on December 5, 1927, and the commission further alleges that the order of May 7, 1929, modified the order of November 5, 1927, so as to show said order of November 5, 1927, to be
72 effective thirty days after its issuance, or on December 5, 1927, instead of August 6, 1926.

IV

Answering paragraphs 14 and 15 of the petition, the commission denies the allegations contained therein.

V

Answering paragraphs 16 and 17 of the petition, the commission admits and alleges that the evidence introduced before it in said proceeding showed that the shipments of silk involved were imported at the ports of San Francisco, California, Seattle, Washington, and Vancouver, British Columbia; that all of the shipments from San Francisco, California, moved over lines of railroads wholly within the United States; that most of the shipments from Seattle, Washington, moved over lines wholly within the United States, although some of them were routed over lines partly in the Dominion of Canada; that all the shipments from Vancouver, British Columbia, moved over lines partly in the Dominion of Canada; that under section 1, paragraph (1), of the interstate commerce act, the provisions of that act apply to common carriers engaged in the transportation of property wholly by railroad from any place

in a foreign country to any place in the United States, or from any place in the United States through a foreign country to any other place in the United States, but only in so far as such transportation takes place within the United States; that the commission interprets the interstate commerce act as not conferring upon it jurisdiction to prescribe divisions of international joint rates; that by its orders of November 5, 1927, May 7, 1929, and February 4, 1930, the commission did not intend to prescribe the division to be accorded to
said Hoboken Manufacturers' Railroad Company out of any
73 joint international rate, and, therefore, said orders should be
interpreted as not prescribing divisions of said joint rates from Vancouver, British Columbia, or from Seattle, Washington, or elsewhere when the transportation is conducted partly through Canada.

VI

Answering paragraph 18 of the petition, the commission denies that petitioners will suffer irreparable injury unless the enforcement of said orders of November 5, 1927, May 7, 1929, and February 4, 1930, is enjoined and suspended.

VII

Answering paragraph 19 of the petition, the commission denies that said orders are either null or void for the reasons, or for any of the reasons, set forth therein.

VIII

Except as expressly herein admitted, the commission denies the truth of each of and all of the allegations contained in the petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in said reports of November 5, 1927, and May 7, 1929, which said reports and the orders of the same dates and the order of February 4, 1930, copies of which are set forth as Exhibits A, B, and C of the petition, are hereby referred to and made a part hereof.

All of which matters and things the commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION,
J. STANLEY PAYNE,
Assistant Chief Counsel.

DANIEL W. KNOWLTON,
Chief Counsel, of Counsel.

74 [*Duly sworn to by Ernest I. Lewis; jurat omitted in printing.*]

75 In United States District Court.

[Title omitted.]

Minute entry

June 17, 1930

Hearing before Statutory Court, composed of Hon. J. Warren Davis, United States Circuit Court judge, Hon. Wm. N. Runyon, United States District Court judge, and Hon. J. Boyd Avis, United States District Court judge.

Appearances: Henry S. Drinker, jr., Esq., and Frank Berger, Esq., for plaintiffs; Parker McCollester, Esq., for intervenor Hoboken Manufacturers Railroad Co.; J. Stanley Payne, Esq., for United States of America and Interstate Commerce Com.

Stipulation filed amending petition.

Oral argument: Mr. Drinker heard for injunction; Mr. McCollester and Mr. Payne, against.

Transcript of evidence before I. C. C. offered by Mr. Drinker. It was stated by Mr. Forman that, due to the inability of Mr. Collins to be present, the Government relied on the argument made by Mr. McCollester and Mr. Payne. Mr. Elmer B. Collins is special assistant to the Attorney General.

Briefs were left with the court.

Decision reserved.

Wm. N. Runyon,
Judge.

_____, *Clerk.*

ARG

76 In United States District Court.

[Title omitted.]

Stipulation amending petition.

Filed June 17, 1930

It is stipulated and agreed between counsel for petitioner, counsel for respondent United States of America, counsel for intervenor Hoboken Manufacturers Railroad Company, and counsel for intervenor Interstate Commerce Commission, that the petition filed herein may be, and the same is hereby, amended by adding as a party complainant and as additional petitioner, named in the caption and prayer of said bill, the following railroad corporation:

Canadian Pacific Railway Company, a corporation organized and existing under the laws of the Dominion of Canada.

Canadian National Railway Company, a corporation, organized and existing under the laws of the Dominion of Canada.

HARRY S. DRINKER, JR.,
Counsel for Petitioner.

ELMER B. COLLINS,
Counsel for Respondent.

PARKER MCCOLLESTER,
Counsel for Intervenor,
Hoboken Manufacturers Railroad Company.

J. STANLEY PAYNE,
Counsel for Intervenor,
Interstate Commerce Commission.

In United States District Court, District of New Jersey.

IN EQUITY.

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANTS

On appeal from order of Interstate Commerce Commission.

Before Statutory Court: DAVIS, Circuit Judge, and RUTTER and AVIS, District Judges.

Appearances: *Henry S. Drinker, jr., Esquire, Frank Boryer, Esquire*, of counsel, solicitor for plaintiffs-appellants; *Elmer B. Collins, Esquire*, solicitor for United States of America, respondent; *Parker McCollester, Esquire, Messrs. Lord, Day & Lord*, solicitors for Hoboken Manufacturers' Railroad Company, intervenor-respondent; *J. Stanley Payne, Esquire*, solicitor for Interstate Commerce Commission, intervenor-respondent.

Opinion.

Filed Sept. 19, 1930.

RUTTER, District Judge: This proceeding is an appeal from an order of the Interstate Commerce Commission, issued May [illegible], 1930, and made retroactive to November 6, 1927, and presents for determination the question as to whether or not, having issued its order under section 15 (6) of the interstate commerce act, and having for the first time, as between connecting carriers, [illegible] through rates, which said order made, in the absence of [illegible] evidence necessary to be considered by the commission in fixing such rates, and therefore failed to meet the statutory requirements

...ants, the Interstate Commerce Commission, after hearing te... mony, subsequently given and bearing upon several prescri... points, may make a new order, providing, among other things, t... it should become effective retroactively as of the date of the origi... order.

The order in question increased from 5¼ cents per hundred pou... to 22 cents per hundred pounds the division of Hoboken Manuf... turers' Railroad on raw silk moved on through rates from ... Pacific coast.

The Hoboken Manufacturers' Railroad Company lies entir... within the confines of Hudson County, New Jersey, and in reality ... a switching road which connects with the termini of various tr... line roads, and delivers freight from such roads to their respect... consignees.

In the original presentation of its claim to the Interstate Co... merce Commission, the Hoboken Railroad included testimony ... signed to show the cost incurred by it in performing its services, ... which may be summarized as follows:

Switching	3.72
Terminal insurance	11.25
Policing	1.25
Unloading and delivery	6.00
	22.22

The testimony shows that the two principal items of cost, viz., ... terminal insurance 11.25 cents, and for unloading and delivery ... cents, came as the result of an arrangement existing between the H... boken Railroad Company and the United States Testing Compa...

whereby the Testing Company, as agent for the Hoboken R... 79 road Company, performed the services of unloading the ... and delivering it to the consignees.

The testing company, engaged in the business of testing a... classifying raw silk, had moved its plant to a site along the ro... of the Hoboken Railroad Company and had made the arrangem... above mentioned, whereby all raw silk consigned for delivery ... the Hoboken Railroad was to be delivered at the testing company's warehouse where the unloading took place, and from which p... delivery to consignees was made. For this service the Hobok... Railroad agreed to pay the testing company the 6 cents per hundr... pounds above noted.

And although the insurance furnished by the trunk lines for ... silk provides a term extending 48 hours beyond the arrival of ... car at destination, it nevertheless terminates immediately upon ... discharge of the car.

The handling of the silk by the testing company, as aforesa... necessitates a discharge of the car and the insurance accordin... ly terminates, thus necessitating the negotiation of additional insurance by ... Railroad Company, pending delivery to the consignee, at a cos... 11.25 cents per 100 pounds.

The silk in question came over the trunk lines from the Pacific coast and the total freight charge per 100 pounds for the entire distance to the point of delivery was $9.00. Of this amount the roads operating west of the Mississippi received 72⅔%, or $6.53⅓, and the roads east of the Mississippi received 27⅓%, or $2.46⅔.

It was in order to obtain a larger percentage of the $9.00 freight charge that the Hoboken Railroad Company instituted its claim, a procedure in which the testing company intervened and offered testimony.

The testimony offered at the hearing which preceded the original order of November 8, 1927, was narrow in its scope, and, as we view it, fell far short of a compliance with the terms of the act. It seems to have been based altogether, so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue and without any reference to the services performed by the trunk lines, or their relation, efficiency, and need of revenue. In other words, its point of view was essentially parochial, rather than all-embracing, as contemplated in the statute.

Furthermore, the commission in its original order, entered November 8, 1927, made its provisions retroactive as of August 6, 1926, the date of filing the complaint.

This order, because of the defects heretofore noted, as well as because of its retroactive feature to which later reference will be made, we believe was, from its inception, void and of no legal effect.

It was some months after the making of this original order, or on February 20, 1928, that the Supreme Court decided the case of Brimstone R. R. Co. vs. United States, which appears in 276 U. S. [illegible]. In this case the court, speaking through Mr. Justice McReynolds, held void an order of the Interstate Commerce Commission, changing divisions of through rates without evidence concerning matters prescribed in section 15 (6) of the act, and likewise stated that such a division order as to rates not theretofore prescribed by the commission might not, in view of the express terms of section 15 (6), be made retroactive. In part, Mr. Justice McReynolds spoke as follows:

"The record discloses that before making the challenged order the commission failed to consider the items definitely specified by section 15 (6). And it must be annulled."

[illegible]

In support of the retroactive provision of the present order it is said that the joint rates between the Brimstone Company and connecting carriers were made under authority of *In re Ports* 74 I. C. C. 220, and *Matter of Reduced Rates*, 49 I. C. C. 670, and therefore were established pursuant to a finding or order of the commission. But more general permission or suggestion concerning [illegible] for all carriers, without consideration of the reasonableness of any particular rate, is not the finding or order referred to by sec-

tion 15 (6). We think that refers to one which, after full hear determined and prescribed a rate thereafter to be observed. T contrary view would place substantially all presently existing ra in the class with particular rates established by order of the co mission after full hearing, subject them to retroactive adjustmen and thus destroy the practical value of the distinction which C gress carefully preserved."

In view of this decision, the commission ordered a rehearing of t Hoboken Railroad case, which was held on July 13, 1928, and which time detailed evidence was introduced as to the various s jects called for by section 15 (6).

As a result of this hearing, and upon the record made therein, t commission entered a new order dated May 7, 1929, the terms which accorded the same allowance to the Hoboken Railroad Co pany as that attempted in the original order of November 5, 19 In this order also was incorporated a retroactive provision, maki its terms effective as of December 5, 1927, despite the fact that t evidence necessary to support such order did not come into existen until the effective date had long since passed.

83 A further order was made by the commission on Februar 4, 1930, effective March 10, 1930, prescribing the same divisi and rates for the future as those theretofore found by said body, a once more the commission acted retroactively in seeking to confi the orders of November 5, 1927, and May 7, 1929, regarding shi ments undertaken prior to March 10, 1930.

Section 15 (6) of the act reads as follows:

"Whenever, after full hearing upon complaint or upon its ow initiative, the commission is of opinion that the division of joi rates, fares, or charges, applicable to the transportation of pass gers or property, are or will be unjust, unreasonable, inequitable, unduly preferential or prejudicial as between the carriers par thereto (whether agreed upon by such carriers, or any of them, otherwise established), the commission shall by order prescribe t just, reasonable, and equitable divisions thereof to be received by t several carriers, and in cases where the joint rate, fare, or char was established pursuant to a finding or order of the commissi and the divisions thereof are found by it to have been unjust, unre sonable, or inequitable, or unduly preferential or prejudicial, t commission may also by order determine what (for the period su sequent to the filing of the complaint or petition or the making the order of investigation) would have been the just, reasonable, a equitable divisions thereof to be received by the several carri and require adjustment to be made in accordance therewith. In prescribing and determining the divisions of joint rates, fares, a charges, the commission shall give due consideration, among oth things, to the efficiency with which the carriers concerned are ma and their relative shares of revenue required to pay their respective ope ing expenses, taxes, and a fair return on their railway property he for and used in the service of transportation, and the importance

the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."

It thus appears that this section prescribes five features which shall go to make up the "full hearing" declared therein as necessary for the commission to have prior to its award and division of joint rates, fares, or charges.

These features to which the commission must give due consideration and concerning which testimony must be taken, are as follows:

1. The efficiency with which the carriers concerned are operated.
2. The amount of revenue required to pay their respective operating expenses, including taxes, and at the same time allow them a fair return on their property held and used for purposes of transportation.
3. The importance to the public of the transportation furnished by the carriers.
4. As to whether any particular participating carrier is an originating, intermediate, or delivering line.
5. Any other fact or circumstance which would ordinarily, regardless of mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge.

In its second hearing the commission received testimony on each of the foregoing five points and thereupon entered its new order bearing date of May 7, 1929, which is the order from which appeal has been taken.

This order, as we view it, based upon the hearing which preceded it, might have fulfilled the intent of its makers, but for its retroactive features.

Fixing the same division to the Hoboken company as had obtained in its first order, the commission thereupon proceeds in its attempt to make the second order retroactive so as to become effective on December 5, 1927, thirty days after the date of the original order of November 5, 1927; endeavoring in this way to comply with that provision of the law which provides that an order of the commission as to division of rates, et cetera, shall not take effect within thirty days after its entry.

We thus have presented a situation wherein an order, which by reason of its evidential background might, irrespective of all other considerations, have accomplished its purpose for the future, yet is burdened with a proviso that its terms should become effective as of a date long preceding the taking of the testimony necessary for its entry, and harking back to and attempting to revitalize a prior order which, builded on a faulty groundwork, was altogether null and void.

It appears to us that the insertion of this retroactive provision served to nullify and make void the commission's second order of May 7, 1929.

A third order was made and entered by the commission February 4, 1930, providing, in part, that on and after March 1930, the Hoboken Railroad Company should receive the 22-c division per hundred pounds, out of the joint eastbound transco tinental rates on silk from points on the Pacific coast to destinati on the line of complainant at Hoboken, N. J., to be apportion among the lines participating in the revenues derived from su traffic east of Chicago and related gateways.

85 This order, we understand, is accepted by the plaintiffs cause of the fact that it becomes effective not less than thir days after its entry.

Despite this acceptance, we feel constrained to say that it is o by reason of its terminology and the distinct division between t terms thereof above noted and a later provision attempting endorse in all particulars the provisions of the two prior orders wi respect to the division of rates on any shipments delivered to transported by complainant prior to March 10, 1930, that this th order does not merit the charges laid against its predecessors, sinc in our opinion, the retroactive character of the latter part of su order renders that portion thereof null and void.

We are here construing a statute, and the rights and remedies o the railroad are determined by a strict interpretation of the pr visions of that statute, and must be weighed in the balance wit that statute provides.

The statute's literal fulfillment, constituting a sine qua non to th proper solution of the question presented, the possible innate justic of the commission's findings can not avail, unless based upon th statute's requirements.

Being of the opinion that the commission erred and violated th provisions of the statute in attempting to make valid a situation which was clearly invalid through the insertion of a retroactive feature in its order of May 7, 1929, we conclude that such order must be set aside and held for naught.

86 [File endorsement omitted.]

87 In United States District Court for the District of New Jersey.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al., petitioners, v. UNITED STATES OF AMERICA, ET AL., RESPONDENTS. } In Equity No. 4011.

Final decree.

The above-entitled proceeding came on for hearing before the statutory court of three judges duly convened, and such hearing having

been held and the argument and briefs of counsel for all parties to the proceedings having been heard and considered, and the court being fully advised, and being of the opinion, for the reasons set forth in its written decision filed herein on 19th day of September, 1930, that the two orders issued by the Interstate Commerce Commission in the proceeding entitled "No. 18672, Hoboken Manufacturers' Railroad Company v. Atchison, Topeka & Santa Fe Railway Company, et al" on November 5, 1927, and May 7, 1929, are unlawful and void and that the relief prayed by petitioners from those two orders should be granted; and, the court being of the further opinion that the order issued on February 4, 1930, by said commission in the same proceeding is valid and lawful and that the relief sought from said order of February 4, 1930, should be denied, it is, therefore

Ordered, adjudged, and decreed that said orders of November 5, 1927, and May 7, 1929, are unlawful, null, and void, and that the relief prayed by the petition against said orders be and it is hereby granted, and said orders are hereby permanently annulled, enjoined, and set aside.

And it is further ordered, adjudged, and decreed that the relief prayed in the petition against said order of February 4, 1930, be, and the same is hereby, denied.

This 19th day of December, 1930.

J. WARREN DAVIS,
United States Circuit Judge.
WM. N. RUNYON,
United States District Judge.
JOHN BOYD AVIS,
United States District Judge.

88 The form of the foregoing decree is satisfactory to counsel for petitioners and counsel for respondents, and the entry of the decree by the court is hereby consented to by them.

_____,
Counsel for Petitioners.
EDWIN B. COLLINS,
Special Assistant to the Attorney General for United States.
J. STANLEY PAYNE,
Assistant Chief Counsel, Interstate Commerce Commission, Intervening Respondent.
_____,
Counsel for Hoboken Manufacturers' Railroad Company, Intervening Respondent.

89 In United States District Court

[Title omitted.]

Assignment of Errors

Filed Feb. 16, 1931

United States of America, respondent, Interstate Commerce Commission, and Hoboken Manufacturers' Railroad Company, intervening respondents, now come by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors upon which they will rely on their appeal to the Supreme Court of the United States from the final decree of the District Court entered December 19, 1930.

The District Court erred:

1. In setting aside, annulling, and permanently enjoining the commission's orders of November 5, 1927, and May 7, 1929.

2. In holding that the commission's order of November 5, 1927, was void because not supported by sufficient evidence.

3. In holding that the testimony offered at the hearing which preceded the commission's orders of November 5, 1927, "fell far short of a compliance with the terms of the act."

4. In holding that the commission's order of November 5, 1927, was based, "so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue."

5. In holding that the commission's order of November 5, 1927, was made "without any reference to the services performed by the trunk lines, or their condition, efficiency, and need of revenue."

90 6. In not holding that the order of November 5, 1927, constituted a valid determination of the future just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company.

7. In not holding that the order of November 5, 1927, was a valid order in so far as it fixed the just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company on and after thirty days from its date, or December 5, 1927.

8. In holding that the commission's order of May 7, 1929, because of the absence of evidence required by the applicable statute to support it, as well as because of its retroactive feature, was null and void.

9. In holding that the commission's orders of November 5, 1927, and May 7, 1929, were "made in the absence of certain evidence necessary to be considered by the commission in fixing such rates [divisions], and therefore failed to meet the statutory requirements."

10. In not holding that the commission's orden of May 7, 1929, which corrected or modified the order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August

1926, was a valid order and that it was within the power of the Commission and proper by its order of May 7, 1929, to correct or modify its order of November 5, 1927, so as to change the effective date thereof from August 6, 1926, to a date thirty days subsequent to the date of the order of November 5, 1927, or December 5, 1927.

11. In not dismissing the petition.

Wherefore, said respondents pray that said final decree of December 19, 1930, be reversed and set aside in the particulars above enumerated, and that said orders of the Interstate Com-
91 merce Commission dated November 5, 1927, and May 7, 1929, be found and adjudged to be valid and lawful in all respects.

PHILLIP FORMAN,
United States Attorney.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.
PARKER McCOLLESTER,
Solicitor for
Hoboken Manufacturers' Railroad Company.

Service of the foregoing assignment of errors and the receipt of a copy thereof are hereby acknowledged this 17 day of February, 1931.

H. S. DRINKER, Jr.
Solicitor for
The Baltimore & Ohio Railroad Company, et al.

92 In United States District Court

[Title omitted.]

Petition for appeal by United States Interstate Commerce Commission and Hoboken Manufacturers' Railroad Company

Filed Feb. 16, 1931

United States of America, respondent, and Interstate Commerce Commission and Hoboken Manufacturers' Railroad Company, intervening respondents, feeling themselves aggrieved by the final decree of the United States District Court for the District of New Jersey entered December 19, 1930, in the above-entitled cause, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein they consider the final order or decree erroneous are set forth in the assignment of errors filed herewith and to which reference is hereby made.

They pray that a transcript of the record, proceedings, and papers on which the final decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

PHILIP FORMAN,
United States Attorney.
ELMER B. COLLINS,
Special Assistant to the Attorney General.
J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.
PARKER MCCOLLESTER,
Solicitor for
Hoboken Manufacturers' Railroad Company.

93 In United States District Court

[Title omitted.]

Order Allowing Appeal

Filed Feb. 16, 1931

In the above-entitled cause, United States of America, respondent, and Interstate Commerce Commission and Hoboken Manufacturers' Railroad Company, intervening respondents, having made and filed their petition praying an appeal to the Supreme Court of the United States from the final decree of this court entered December 19, 1930, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided;

It is ordered and decree that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date thereof, and the clerk is directed to transmit forthwith to the Supreme Court of the United States a properly authenticated transcript of the record, proceedings, and papers on which the decree was made and entered.

Dated, February 16, 1931.

(Signed) JOHN BOYD AVIS,
United States District Judge.

94 Service of the foregoing order allowing appeal and the receipt of a copy thereof are hereby acknowledged this ——— day of February, 1931.

———
Solicitor for
The Baltimore & Ohio Railroad Company et al.

In United States District Court

[Title omitted.]

Notice of appeal.

Filed February 16, 1931.

To Honorable WILLIAM A. STEVENS,
Attorney General of the State of New Jersey:

You are hereby notified that the respondents, United States of America, Interstate Commerce Commission, and Hoboken Manufacturers' Railroad Company, have taken an appeal from the final decree of the United States District Court for the District of New Jersey, entered in the above-entitled cause December 19, 1930, to the Supreme Court of the United States, and that the order allowing the appeal makes the same returnable within thirty (30) days from the date thereof.

This notice is given you pursuant to urgent deficiencies act, October 22, 1913 (38 Stat. L. 221).

PHILIP FORMAN,
United States Attorney.
ELAINE B. COLLINS,
Special Assistant to the Attorney General.
J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.
PARKER MCCOLLESTER,
Solicitor for
Hoboken Manufacturers' Railroad Company.

96 Service of the foregoing notice and the receipt of a copy thereof are hereby acknowledged this 16th day of February, 1931.

(Signed) WILLIAM A. STEVENS,
Attorney General, State of New Jersey.

97-98 [Citation in usual form showing service on Henry S. Drinker, jr., filed Feb. 18, 1931, omitted in printing.]

99 In United States District Court

[Title omitted.]

Notice of appeal.

Filed Feb. 17, 1931

To the Baltimore and Ohio Railroad Company, the Central Railroad Company of New Jersey, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Delaware, Lackawanna & Western Railroad Company, the Erie Railroad Company, the Champlain & St. Lawrence Railroad Company (Canadian National

Railway Company, Lessee), the United States and Canada Rail-road Company (Canadian National Railway Company, Lessee), the Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), Detroit, Grand Haven and Milwaukee Railway Company, Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee), Grand Trunk Western Railway Company, the Michigan Air Line Railway, Toledo, Saginaw & Muskegon Railway Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, the Michigan Central Railroad Company, the New York Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, New York, Ontario & Western Railway Company, the Pennsylvania Railroad Company, and Wabash Railway Company, petitioners:

Please take notice that, pursuant to the statutes and rules of court in such case made and provided, United States of America, respondent, and Interstate Commerce Commission and Hoboken Manufacturers' Railroad Company, intervening respondents,
100 the above-entitled cause, and each of them, do hereby appeal to the Supreme Court of the United States from the final decree of the United States District Court for the District of New Jersey made and entered in the above-entitled cause on December 19, 1930, which permanently annulled, enjoined and set aside two certain orders of the Interstate Commerce Commission issued November 5, 1927, and May 7, 1929, in the proceeding entitled "No. 18672, Hoboken Manufacturers' Railroad Company v. Atchison, Topeka & Santa Fe Railway Company, et al.," 132 I. C. C. 579 and 155 I. C. C. 330, prescribing just, reasonable, and equitable divisions of joint rates on silk from points on the Pacific coast to destinations on the line of the Hoboken Manufacturers' Railroad Company.

PHILIP FORMAN,
United States Attorney.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.

PARKER MCCOLLESTER,
Solicitor for
Hoboken Manufacturers' Railroad Company.

Service of the foregoing notice of appeal and the receipt of a copy thereof are hereby acknowledged this 14 day of February, 1931.

HARRY S. DARLINGTON, JR.,
Solicitor for
The Baltimore & Ohio Railroad Company and
Other Railroad Common Carriers Named Above.

101 [Bond on appeal for $250.00 approved and filed February 20, 1931, omitted in printing.]

In United States District Court

[Title omitted.]

Præcipe for transcript of record.

Filed Mar. 11, 1931

To the Clerk:

Please prepare a transcript of the record in the above entitled cause in the matter of the appeal therein and include in said transcript the following matter, viz:

1. Petition filed by petitioners.
2. Order to show cause.
3. Petition of intervention of Hoboken Manufacturers' Railroad Company.
4. Order of court permitting intervention of the Hoboken Manufacturers' Railroad Company.
5. Answer of Hoboken Manufacturers' Railroad.
6. Intervention of Interstate Commerce Commission.
7. Answer of Interstate Commerce Commission.
8. Answer of United States.
9. Minutes of the proceedings of June , 1930, before the United States District Court except the arguments.
10. Stipulation adding Canadian National Railway Company and Canadian Pacific Railway Company as complainants and as additional petitioners.

196 11. Printed transcript of the record before the Interstate Commerce Commission in the proceeding before that Commission styled No. 18672, Hoboken Manufacturers' Railroad Company v. Atchison, Topeka & Santa Fe Railway Company et al., including:

(a) Certificate of the Secretary of the Interstate Commerce Commission.

(b) Complaint filed August 6, 1926, by the Hoboken Manufacturers' Railroad Company.

(c) Answer of the Erie Railroad Company.

(d) Transcript of the stenographer's minutes of the hearing held November 22, 1926, at New York, N. Y., before Examiners R. N. Trezise and J. E. Snyder, and exhibits filed at said hearing numbered 1 to 8, both inclusive.

(e) Report and order of the commission filed and entered November 5, 1927.

(f) Order of the commission for rehearing, dated May 14, 1928.

(g) Transcript of the stenographer's minutes of the hearing held July 13, 1928, at New York, N. Y., before Examiners J. E. Smith and L. L. Prout, and of exhibits filed at said hearing numbered 9 to 31, both inclusive.

(h) Report and order of the commission filed and entered May 7, 1928.

(i) Motion for further order filed January 7, 1930.

(j) Defendants' answer to motion for further order filed January 17, 1930.

(k) Order of the commission entered February 4, 1930.

107 12. Opinion of the court, by Judge Runyon.

13. Final decree.

14. Petition for appeal.

15. Bond for appeal.

16. Assignment of errors.

17. Citation on appeal.

18. Notice to petitioners of appeal.

19. Notice to attorney general of New Jersey of appeal.

20. Order allowing appeal.

21. This precipe.

22. Docket entries in their proper order.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

J. STANLEY PAYNE,
Solicitor for Interstate Commerce Commission.

PARKER MCCOLLESTER,
Solicitor for Hoboken Manufacturers' Railroad Company.

I have read the above precipe and do not desire to file a separate precipe indicating any additional portions to be included.

HENRY S. DRINKER, Jr.
Solicitor for Petitioners.

BEFORE THE

Interstate Commerce Commission.

WASHINGTON

I, GEORGE B. MCGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached are true copies of the following:

Complaint filed August 6, 1926.

Answer of the Erie Railroad Company,

Transcript of the stenographer's notes of the hearing held November 22, 1926, at New York, N. Y., before Examiners R. N. Trezise and J. E. Snider and of exhibits filed at said hearing.

Report and order of the Commission filed and entered November 5, 1927.

Order of the Commission entered May 14, 1928.

Transcript of the stenographer's notes of the hearing held July 13, 1928, at New York, N. Y., before Examiners J. E. Smith and L. L. Prout and of exhibits filed at said hearing.

Report and order of the Commission filed and entered May 7, 1929.

Motion for further order filed January 7, 1930.

Defendants' answer to motion for further order filed January 17, 1930, and

Order of the Commission entered February 4, 1930, in Case No. 18672, Hoboken Manufacturers' Railroad Company v. Atchison, Topeka & Santa Fe Railway Company,

et al., the originals of which are now on file and of record in the office of this Commission.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Commission this first day of March, A. D. 1930.

(Seal)

(Sgd.) GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

COMPLAINT.

(Filed August 6, 1926.)

BEFORE THE

INTERSTATE COMMERCE COMMISSION.

Docket No. 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

v.

The Atchison, Topeka and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Canadian Pacific Railway Company, The Central Railroad Company of New Jersey, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee and St. Paul Railway Company (H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers), Chicago and North Western Railway Company, The Chicago, Rock Island and Pacific Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Grand Trunk Railway System (Lines in the United States, East of the West Bank of the Detroit and St. Clair Rivers) comprised of: Canadian National Railway Company, The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee), Grand Trunk Railway System (Lines west of Detroit and St. Clair Rivers) comprised of: The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee), Detroit, Grand Haven and Mil-

waukee Railway Company, Grand Trunk Western Railway Company, Grand Trunk-Milwaukee Car Ferry Company, The Michigan Air Line Railway, Toledo, Saginaw and Muskegon Railway Company, Great Northern Railway Company, Illinois Central Railroad Company, Lehigh Valley Railroad Company, The Michigan Central Railroad Company, Missouri Pacific Railroad Company, The New York Central Railroad Company, The New York, Chicago and St. Louis Railroad Company, New York, Ontario & Western Railway Company, Northern Pacific Railway Company, The Pennsylvania Railroad Company, Southern Pacific Company, Union Pacific Railroad Company, Wabash Railway Company, The Western Pacific Railroad Company,

Defendants.

C. D. O'Neal,
General Manager,

Hoboken Manufacturers' Railroad Company,
Foot 5th, Street,
Hoboken, N. J.

July 10, 1926.

The complaint of the Hoboken Manufacturers' Railroad Company respectfully shows:

I. That complainant is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in the City of Hoboken, New Jersey.

That complainant is a common carrier engaged in state and inter-state commerce. The principal office of complainant is at foot of Fifth Street, Hoboken, New Jersey.

II. That defendants above-named are common carriers engaged in the transportation of passengers and property,

wholly by railroad or partly by rail and partly by water and, in connection with complainant, transport property from and to points on complainant's line; and as such are subject to the Interstate Commerce Act.

III. That complainant's line of railroad has direct rail connection with the tracks of the Erie Railroad Company in Hoboken, New Jersey, and through said connection with the Erie Railroad Company and its connections, connection is also had with the other defendants named herein. Direct connection by means of certain defendants' car floats is also provided over complainant's floatbridge located on the waterfront at Fifteenth Street, in the City of Hoboken, New Jersey. Traffic originating at or destined to points on complainant's line of railroad is received from or delivered to substantially all parts of the United States.

IV. The complainant is party with defendants to joint rates and charges applying on various classes of freight as set forth in numerous tariffs, such as R. H. Countiss, Agent, I. C. C. No. 1163. The divisions or allowances made to complainant by defendants on all classes of freight handled under joint rates are shown in Hoboken Manufacturers' Railroad Tariff I. C. C. No. 114, as follows:

Description of Traffic	*To and from territory described below taking groups.* A	B
	Proportions in Cents per 2000 or 2240 pounds as rated	
Carload traffic loaded or unloaded by Railroad	1.01	.96
Carload traffic (local) handled on team tracks or sidings	.32	.30
Less than carload traffic, received at or delivered from freight station, foot of Fifth St., Hoboken, N. J.	1.11	1.05

Automobiles, carloads, for local delivery	$6.00 per car
Baggage, Express or Mail Cars, containing baggage, etc., handled on team tracks or sidings	$18.00 per car

Group A territory is included within the following limits:

The Atlantic Seaboard from the Canadian Border to Norfolk, Va.

The Main Line of the Norfolk & Western Railway from Norfolk, Va., to Kenova, W. Va.

The Main Line of the Chesapeake & Ohio Railway from Kenova, W. Va., to Cincinnati, Ohio.

The Ohio River to Cairo, Ill.

The Mississippi River to the Mouth of the Illinois River, at or near Grafton, Ill.

The Illinois River from Grafton, Ill., to Pekin, Ill.

A Line South and East of the Atchison, Topeka & Santa Fe Railway from Pekin, Ill., Joliet and Streator, Ill., to Chicago, Ill.

A Line Drawn from Chicago, Ill., to include the Southern Peninsular of Michigan, and thence following the International Boundary to the Atlantic Seaboard.

Including that Portion of the Virginian Railway Extending South of the Southern Boundary.

And Excluding those portions of the Southern Railway, Louisville & Nashville Railroad, Mobile & Ohio Railroad, Atlantic Coast Line Railroad and Seaboard Air Line extending North of the Southern Boundary.

Group B territory includes *all other* territory not in Group A. The above allowances do not apply on coal or ice.

V. With the exception of automobiles, coal and ice, no distinction, in allowances to complainant, is made by defendants regardless of character, value, weight or dimensions.

VI. There is about to be offered for delivery on the rails of complainant, raw silk and silk in various stages of manufacture moving under joint rates and charges from the Pacific Coast. The through rate from the Pacific Coast to the Port of New York is $9.00 per 100 pounds. The average carload contains about 40,000 lbs. and the average value of this commodity is about $6.00 a pound. The complainant is informed that transcontinental movement will be in train load and car lot shipments, and will at times arrive in large quantities. Under the existing divisions or allowances, the complainant will receive as its proportion of the through rate the approximate sum of 5¼ cents per 100 pounds or about ½ of 1 per cent. of the through joint rate notwithstanding the fact that this company is the delivering line and performs very expensive terminal services.

VII. The complainant has not heretofore handled raw silk in either train load or car lot shipments for delivery on its line of road, but upon investigation has found that the terminal service required in the delivery of this commodity is highly expensive. Special police protection must be provided, as well as protection against theft, fire, burglary and damage, by insurance. The insurance complainant will have to pay on this traffic will be at the same rates as now paid by defendants at their own terminal, but will constitute approximately at 11¼ cents per 100 pounds, or approximately 48 per cent. of complainant's estimated terminal expenses.

VIII. The complainant, after carefully studying various items of expense entering into the terminal handling of raw silk and silk in various stages of manufacture, find that the minimum estimated cost of performing the terminal service will be about 25 cents per 100 pounds. Detailed estimate of the various expense factors is given below:

	Per Car 40,000 lbs.	Cents per 100 lbs.	Per Ton 2,000 lbs.
Switching	$15.00	3¾	$ .75
Policing	10.00	2½	.50
Terminal Insurance	45.00	11¼	2.25
Proportion transcontinental insurance	3.00	¾	.15
Unloading, checking and delivery	20.00	5	1.00
Total estimated cost	$93.00	23¼	$4.65

IX. Complainant has requested defendants to grant an allowance of 25 cents per 100 pounds for the terminal service involved, and to except raw silk and silk in various stages of manufacture from the general allowances shown in paragraph IV *supra*.

Defendants have declined to grant complainant's request for any increase whatever in the allowance for handling raw silk over the allowances for general merchandise set forth in paragraph IV, notwithstanding that it is common knowledge that terminal expenses on silk traffic are much greater than on general merchandise.

X. Complainant has submitted to defendants all facts in its possession bearing upon the heavy expense of terminal service for handling raw silk and silk in various stages of manufacture, and has pointed out to defendants that the present allowances on general merchandise are inadequate, inequitable, unjust and unduly prejudicial to complainant, and has repeatedly requested that a fair allowance be made for this service, but defendants have failed and declined to do so.

XI. By reason of the foregoing facts it is alleged that the divisions accorded to complainant by defendants are unjust, unreasonable, inequitable and inadequate, in violation of Paragraph (4) of Section 1 of the Interstate Commerce Act.

XII. Wherefore, complainant respectfully prays that said defendants be required to answer the complaint herein contained, and that after due notice, hearing and investigation an order be made requiring said defendants, according as they participate, to establish, in connection with complainant, a just, reasonable, equitable and non-prejudicial division or allowance of the joint rates and charges for the transportation and delivery of raw silk and silk in various stages of manufacture; said division or allowance to complainant to be not less than 25 cents per 100 pounds; and that such other and further orders be made as the Commission may consider reasonable and proper in the premises.

Respectfully submitted,

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

By (Sgd.) C. D. O'NEAL,
General Manager.

Foot Fifth Street,
Hoboken, N. J.
July 10, 1926.

ANSWER OF THE ERIE RAILROAD COMPANY.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

Docket No. 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

v.

The Atchison, Topeka and Santa Fe Railway Company, et al.,
Defendants.

ERIE RAILROAD COMPANY, for its answer to the complaint in this proceeding, respectfully states:

1. It believes to be true the allegations in paragraph 1 of the complaint.

2. It admits that it is a common carrier engaged to some extent in the transportation of property by railroad from and to points on complainant's line.

3. It denies that the divisions accorded to complainant by it are unjust, unreasonable, inequitable and inadequate, in violation of paragraph (4) of Section 1 of the Interstate Commerce Act.

WHEREFORE, defendant prays that the complaint be dismissed.

Dated New York, N. Y., September 28, 1926.

ERIE RAILROAD COMPANY,
By (Sgd.) D. L. GRAY,
Vice-President.

M. B. PIERCE,
Attorney for Defendant,
50 Church Street,
New York, N. Y.

TRANSCRIPT—FIRST HEARING.
(Filed November 22, 1926.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

Docket 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

v.

The Atchison, Topeka and Santa Fe Railway Company, et al.,
Defendants.

New York, N. Y., November 22, 1926.
10 o'clock a. m.

Before: R. N. TREZISE and J. E. S[illegible]DER, examiners.

Met pursuant to notice.

Appearances: CHARLES D. O'NEAL, Hoboken, New Jersey, appearing for the Hoboken Manufacturers' Railroad Company.

E. B. COLLINS, special assistant to the attorney general, Department of Justice, appearing for complainant and Secretary of War, intervener.

JAMES W. CARMALT, Southern Building, Washington, D. C., appearing for the United States Testing Company, intervener.

C. C. HABBERSTAD, assistant manager of the Hoboken Chamber of Commerce, Hoboken, New Jersey, appearing for the Hoboken Manufacturers' Railroad.

MARION B. PIERCE, 50 Church Street, New York City, appearing for defendants.

S. H. GILLETTE, 226 West Jackson Boulevard, Chicago, Ill., appearing for the Chicago & Northwestern Railway Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee & St. Paul Railway Company (H. E. Byram, M. W. Potter and E. J. Brundage, Receivers), Chicago, Rock Island & Pacific Railway Company and Illinois Central Railroad Company.

H. G. TOLL, 608 South Dearborn Street, Chicago, Ill., appearing for Transcontinental Freight Bureau Lines.

PROCEEDINGS.

EXAMINER SNIDER: You are all ready, gentlemen? The hearing is opened.

The Commission has set for hearing at this time and place Docket 18672, the Hoboken Manufacturers' Railroad Company v. the Atchison, Topeka & Santa Fe Railway Company, *et al.*

Who appears for the complainant?

MR. COLLINS: E. B. Collins.

EXAMINER SNIDER: And for the defendants?

MR. PIERCE: M. B. Pierce.

EXAMINER SNIDER: For the interveners?

MR. CARMALT: James W. Carmalt, for the United States Testing Company, intervener.

MR. COLLINS: E. B. Collins, for the Secretary of War, as intervener.

MR. TOLL: Mr. H. G. Toll, for the Transcontinental Freight Bureau.

MR. GILLETTE: For the defendants, S. H. Gillette, assistant general freight agent of the Chicago & Northwestern Railway Company; representing also the Chicago, Burlington & Quincy Railroad Company, Chicago, Milwaukee & St. Paul Railway (H. E. Byram, Mark W. Potter and E. J. Brundage, Receivers); lines east of the Missouri River and between cities, Chicago, Rock Island and Pacific Railway Company; east of the Missouri River, Illinois Central Railroad Company.

EXAMINER SNIDER: Are there any further appearances?

MR. HABBERSTAD: For the Hoboken Chamber of Commerce, representing the Hoboken Shore Road of Hoboken Manufacturers' Railroad Company.

EXAMINER SNIDER: It is alleged that the divisions accorded to complainant out of joint rates on silk, from points on the Pacific coast to destinations on complainant's line are unjust and unreasonable, in violation of Section 1 of the Interstate Commerce Act.

The Commission is asked to prescribe reasonable divisions for the future.

Is that statement correct?

EXAMINER TREZISE: Has the Hoboken Chamber of Commerce filed any petition in intervention?

MR. HABBERSTAD: I signed one of those sheets, there.

EXAMINER TREZISE: That was merely an appearance slip. The rules of practice, of course, in these cases, require that the intervener should file a petition, but I presume that you may be able, before the case is through, to state your position in the case.

MR. HABBERSTAD: I have a sheet here explaining my position, if this would serve the purpose. It is a simple statement of our position.

EXAMINER TREZISE: Of course, the rules of practice require that the petition be filed and a certain number of

copies be filed with the Commission and with the parties. Could you draw up a short petition before the hearing is closed, just a short one so that you can properly be made a party to the proceeding?

MR. HABBERSTAD: Yes, sir, I will do that.

MR. COLLINS: If the Examiner please, we would like to request that we be allowed to amend the complaint at this time; first, to ask that any increase in the allowance or division granted by the Commission be made applicable as of the date of the complaint. That request is not in the complaint. At the time the complaint was filed no silk shipments had moved.

EXAMINER TREZISE: You are asking that the divisions that may be prescribed by the Commission be made effective as of the date of the complaint?

MR. COLLINS: Yes. That thing is not specifically prayed for in the complaint. Simply so that the complainant will have the benefit of any adjustment made in the allowance on all silk shipments that have moved.

EXAMINER TREZISE: Is there any objection to that amendment?

MR. PIERCE: No.

EXAMINER TREZISE: No objection.

MR. COLLINS: We ask for permission to further amend the complaint to request a minimum allowance for the switching of a car of $25, switching a car.

MR. PIERCE: Does that mean so that you are now asking that your division be made $25 a car?

MR. COLLINS: No. The complaint asks for a division or allowance of twenty-five cents per hundred pounds. What we are asking for is that we have the benefit of the minimum charge per car of $25.

MR. PIERCE: That is, you are asking that the Commission give you, as your division for the service that you perform, $25?

MR. COLLINS: Yes, on any one car, for the service performed by the Hoboken Manufacturers' Railroad on the car, switching and delivering or any other service they perform,

EXAMINER TREZISE: How does that compare with the twenty-five cents per hundred pounds on the average car, more or less?

MR. COLLINS: In the case of some cars, the allowance of twenty-five cents per hundred pounds will not pay, even if that were granted by the Commission, that would not pay for the actual physical handling of the car alone, without regard to the tonnage.

MR. CARMALT: That means, Mr. Collins, as I understand it, that it is the same thing as to take a minimum of 10,000 pounds?

MR. COLLINS: Yes, it would work out the same in practical effect.

EXAMINER TREZISE: You ask that the complaint be amended to ask for a minimum of $25 per car, but not less than twenty-five cents per hundred pounds; does that state it?

MR. CARMALT: The reverse statement of it would be more clearly my understanding of Mr. Collins' position: that the allowance be fixed at twenty-five cents per hundred pounds, but not less than $25 per car.

EXAMINER TREZISE: Very well. That is the point I wanted to bring out.

MR. COLLINS: Requesting an allowance of twenty-five cents per hundred pounds with a minimum allowance per car of $25.

EXAMINER TREZISE: Yes, thank you. Any objection to that amendment?

MR. PIERCE: I have not.

EXAMINER TREZISE: No objection.

EXAMINER SNIDER: You may proceed, Mr. Collins.

MR. COLLINS: Mr. O'Neal, take the stand, please.

CHARLES D. O'NEAL was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. COLLINS:

Q. What is your position?

A. Vice-president and general manager of the Hoboken Manufacturers' Railroad Company.

Q. How long have you held that position?

A. For nearly six years.

Q. Will you state briefly what are your duties in that position?

A. To manage the operations of the Hoboken Manufacturers' Railroad in all respects.

Q. The Hoboken Manufacturers' Railroad is the complainant in this case?

A. Yes.

Q. Is it a corporation?

A. It is.

Q. Under what laws?

A. State of New Jersey.

Q. And it is a common carrier, is it?

A. It is.

Q. Handling interstate commerce?

A. Yes.

Q. Is it a party to tariffs of other roads?

A. Yes.

Q. And is it a party to H. G. Toll's Import Tariff 30-I. C. C. No. 1176?

A. Yes.

Q. Who owns the capital stock of the Hoboken Manufacturers' Railroad?

A. The United States Government in the name of the Secretary of War.

Q. Have you a map which shows the tracks and location of the railroad?

A. Yes, sir.

MR. COLLINS: I want to offer this map in evidence as an exhibit, Mr. Examiner.

EXAMINER TREZISE: May it be agreed that the exhibits that are offered will be shown as having been received and made part of the record unless objection is made to the receipt of these?

MR. COLLINS: Yes.

EXAMINER TREZISE: It will be shown as received as Exhibit No. 1.

(The map was thereupon received in evidence, marked "Complainant's Exhibit No. 1, Witness O'Neal," and is forwarded herewith.)

MR. COLLINS: We do not have copies for all these appearances. We have only two or three copies. I wonder if there is anyone who specially wants one. I imagine everyone knows the location of the road.

EXAMINER TREZISE: I imagine the defendants at least would want a copy of it. Can additional copies be made at a subsequent date? Perhaps we can use those three copies there to advantage during this case and the additional copies can be furnished afterwards. Can that be done?

THE WITNESS: We can furnish additional copies within twenty-four hours.

EXAMINER TREZISE: Distribute them to the best advantage and then it will be understood that the parties that have not copies to take away with them will be furnished with copies.

By MR. COLLINS:

Q. Mr. O'Neal, will you indicate on this map by mark the connection between the tracks of the Hoboken Manufacturers Railroad and the Erie Railroad? Have you designated it on the map?

A. Yes.

Q. How?

A. At the north end of the Hoboken Manufacturers Railroad we indicate by "A" the connection with the Erie Railroad.

Q. And have you indicated also the location of the warehouse at which you are storing silk, at which you are unloading silk?

A. I have. The location is at Fifteenth Street and Park Avenue, indicated by the letter "B."

Q. And have you also indicated your Hoboken Manufacturers' local freight house?

A. Yes, that is located at Fifth Street on the waterfront, indicated by the letter "C."

Q. The Hoboken road connects with the Erie, direct track connection?

A. Direct track connection with the Erie Railroad.

Q. What other connections, if any, have you with other roads?

A. Through the Erie Railroad with all other roads on the west shore of the Hudson River except the B. & O., and with the B. & O. through float-bridge connection.

Q. With the B. & O.?

A. With the B. & O. through float-bridge connection.

By MR. CARMALT:

Q. Is that quite accurate, Major? Can you not reach the B. & O. with a second intermediate line?

A. Yes, it can be done.

By Mr. Collins:

Q. Now, will you describe briefly the service performed by your road in the handling, switching and delivering of silk, where you take it up, how far you haul it?

A. Silk is delivered in cars on the interchange track between our road and the Erie Railroad by the switch engines of the Erie. It is taken up then by our switch engine and switched to the plant of the warehouse at Fifteenth Street and Park Avenue, where it is unloaded and the empty cars are then taken and returned to the Erie Railroad.

Q. For whom is it unloaded there, for the railroad or someone else?

A. On account of the railroad, of course.

Q. What is the approximate distance of that movement?

A. The distance is very short; only about two city blocks.

Q. What is the present allowance that you receive for that service?

A. The present allowance is $1.05 per ton.

Q. It works out to about how much per hundred pounds?

A. Less than five and a half cents.

Q. What is the tariff which publishes that allowance?

A. I. C. C. No. 114.

Q. Whose tariff is it?

A. The Hoboken Manufacturers Railroad Company's.

Q. Under that tariff, do you receive the same allowance for switching silk as you do on other traffic?

A. Yes. With certain exceptions.

Q. What are those?

A. On all less-than-carload traffic we receive $1.05.

Q. And is silk that type of traffic?

A. Silk is that type of traffic.

Q. Necessitating your unloading of it?

A. Yes, moving under any-quantity ratings.

Q. What is that rate, by the way, do you know, from the Pacific Coast?

A. Nine dollars per hundred pounds.

Q. At the time this complaint was drawn, I believe you made your calculations upon estimates of the cost to you?

A. Yes. We had to estimate what the cost would be. We had not handled any silk and we had no direct costs to show.

Q. Are you prepared to show now your actual costs of handling silk, based upon your experience in handling it?

A. Yes.

Q. Have you a statement showing such costs?

A. I have. (Producing statement.)

MR. COLLINS: I offer that statement in evidence, Mr. Examiner.

(The statement was thereupon received in evidence, marked "Complainant's Exhibit No. 2, Witness O'Neal," and is forwarded herewith.)

EXAMINER TREZISE: The rule requires that two copies be given to the Commission, at least, one to the Examiner and one to the Reporter.

By MR. COLLINS:

Q. Mr. O'Neal, will you explain this statement, first as to your item of switching and the figure shown there per car?

A. The item of switching is shown as $14.93 per car.

Q. And what does that include or exclude?

A. That includes all items of expense incident to the actual switching operations: Salaries and wages of the crew, fuel for locomotives, certain overhead expenses that enter into it. Shall I tell you how that is based?

Q. State this: How have you arrived at this particular charge for switching? Is a charge allocated to switching, or how have you taken it?

A. It is. It is a charge that is strictly allocated to switching.

Q. Could you tell just what calculations you used in reaching that figure?

A. Yes. For the year 1925, we used that as a basis. We have made a very careful calculation of all expenses and the allocation of these expenses to our various operations for the year 1925, in order to get any complete calendar year, and we find that the allocation of switching expenses, expenses purely chargeable to switching, when applied to the entire car movement, loaded car movement, I mean, shows that the cost for every car, or the average cost for all cars, amounted to $14.93 per car for switching.

Q. That does not include unloading costs or handling and delivering costs?

A. No.

Q. You say that is for the year 1925?

A. That is for the year 1925.

Q. Are your costs substantially the same this period?

A. Practically the same. The tonnage has averaged for this year just about the same as for last year, and expenses have been about the same basis.

Q. And this is the average over the whole year of 1925?

A. This is the average for the entire year of 1925.

Q. Of course, you have figured this down to a ton basis?

A. Yes.

Q. And per hundred pounds, as shown?

A. Yes.

Q. Now, the item of insurance you show there as $45 per car. Is that an expense particularly incurred on silk shipments?

A. Yes.

Q. Do you have such an expense on other classes or types of traffic?

A. No.

Q. This policing, what can you say of that?

A. That is purely on silk.

Q. And why the necessity of the insurance and the policing?

A. The necessity of the insurance and policing is due to the very high value of the commodity that is being handled, silk, and it is necessary to throw every possible safeguard around it.

By Mr. Carmalt:

Q. Is it not also necessary, under the insurance policy, that you have a special policeman in connection with this traffic?

A. Yes, sir.

By Mr. Collins:

Q. Do you have one or more policemen? How many policemen or how many men are guarding this silk that is brought in?

A. Well, we usually have about four men assigned to the protection of silk regardless of the number of cars of silk we have at any one time.

Q. That is, the time of four men is consumed upon each shipment, whether it be one car or three cars—how many cars can you deliver at once, can you place on the siding at once?

A. At the siding at this warehouse we can place three baggage cars at once, if the silk is in baggage cars; if in ordinary freight cars, we can place four cars, I believe, at once.

Q. But your policing is the same regardless of the number of cars?

A. It is the same.

Q. Of course, if you had more than three cars, it would require a longer period for delivery, would it not?

A. Oh, yes.

Q. And would your policing be the same then?

A. That would depend upon how many silk cars we had. If we had a large number of cars, we would have to put on a greater policing force.

Q. If you had six cars, for instance, your policing would be greater than shown here?

A. I think for six cars our policing would be about the same as shown here, but if and when this becomes more regular, it is going to be necessary to put on a greater police force, as we now see it.

Q. What is the rate of pay for this policing, rate of pay for the special guards, or policemen?

A. About $5 a day, I believe.

Q. How long does one of these switch movements last or require about how much time?

A. That will vary, but usually the switching is done immediately upon the cars being placed upon the interchange track and if we have nothing else to interfere it can be handled very readily, say, in one hour and a half to each car.

Q. Can you employ guards to work one and a half hours on that particular task?

A. No.

Q. For how long a time would you have to employ them?

A. If you go out and employ extra guards, you have to hire them for a day at a time or longer.

Q. Thiis insurance shown here as eleven and a quarter cents per hundred pounds, what is the rate of insurance and how is it calculated in the policy?

A. One and one-half cents premium on a valuation of $100.

Q. One and a half cents per each one hundred dollar value?

A. Yes.

Q. You have shown here unloading and delivering costs. Can you explain as to that item of $24 per car, what it includes?

A. That is the actual cost to us for unloading, putting in the warehouse, and making delivery to consignees.

Q. And worked down to a per ton basis, it is one dollar and twenty cents, and six cents per hundred pounds?

A. That is right.

Q. These calculations per car here have been made on what loading basis?

A. On the basis of forty thousand pounds to the car.

Q. Where is the silk, where do you store this silk during the forty-eight hours free time?

A. We store it in the warehouse belonging to the United States Testing Company, located at Fifteenth Street and Park Avenue.

Q. Could you tell briefly what the arrangement is between you and that company?

A. Briefly, the arrangement is that when we receive silk, we put it on the side track to that warehouse. The unloading is performed by experienced labor of the testing company——

Q. Experienced, how?

A. Experienced in handling silk, checking, calculating, moving, storing, handling, such as that. It is unloaded by their labor under the supervision of our company and the testing company. It is stored in that warehouse for a period of forty-eight hours, and if not delivered earlier, consignees having been notified in the meantime, if they wish to take delivery before the period of forty-eight hours, they may do so, but if after forty-eight hours no delivery has been taken, the silk is turned into storage with the testing company. They give us warehouse receipts for it, regular standard warehouse receipts.

Q. Of course, your liability as a common carrier expires with the forty-eight hours free time?

A. Yes, that is provided for.

Q. Where is the silk? Is it scattered through the house during this forty-eight hours, or have you a portion of this warehouse assigned specifically to the storage of the silk during this forty-eight hours' free time?

A. No particular portion of the warehouse is assigned, except as occasion may demand. It may be more convenient one day to put it in this corner or more convenient on another day to put it in that corner, but the record is kept just the same. It doesn't make any difference to us which side of the building he puts it, just so that it is kept in storage.

Q. What can you say as to the advantages, economy, or disadvantages of storing the silk in this manner, unloading in this manner, handling, storage and delivery to consignees?

MR. CARMALT: May I ask one question before you get to that?

MR. COLLINS: Yes.

By MR. CARMALT:

Q. This traffic moves, then, to the testing company's warehouse on l. c. l. billing, does it not?

A. Yes.

Q. It is an any-quantity rate?

A. Yes.

Q. And requires the unloading by the carrier—it is not consigned to the testing company?

A. Not by any means, no. May I say that that warehouse is selected by us because of the safety and economy of operation by the railroad company.

By MR. COLLINS:

Q. You are using that as your unloading and storing point and delivering point instead of your local freight house?

A. Exactly.

Q. Why?

A. Because it is more economical and convenient to us. It is a better storage, a better safeguard for this commodity.

Q. Your local freight house is how much further away from your Erie track connection?

A. Our local freight house is located at Fifth Street, further south, or ten blocks south and two blocks west, twelve blocks further away, almost a mile.

Q. Have you anything to say with respect to what it might cost you to prepare for what you consider proper storage and protection of silk while your road has the responsibility for it?

A. We have no other facilities adequate to take care of silk. At our Fifth Street station, we could not take care of it. We have not the room or the character of building suitable for the storage of silk and the protection as well.

Q. What do you mean by the protection?

A. Protection against burglary, fire, theft, damage, and so forth, the same as we have in the warehouse at Fifteenth Street.

Q. Do you know where the silk, the greater part of it, goes upon delivery to consignees from this warehouse?

A. I have no idea where it all goes. A great deal of it is moved out by motor truck from the warehouse. Just where that goes, I don't know; various places.

Q. Do you know whether a great quantity of that silk eventually crosses New York harbor after it is delivered to the consignees or does it go to mills?

A. After delivery to the consignees, the information I have is that the greater portion of the silk after delivery to consignees moves west of the river and does not have to cross the river.

Q. So that by this handling it is not necessary to handle the floats across the harbor and back?

A. Exactly so.

Q. Your information, is it not, is to the effect that a great quantity of it goes from there to the silk mills?

A. The silk mills west of the river.

Q. In delivering silk into New York City, what particular service is necessitated to get it across the harbor?

A. Do you mean before it is delivered to the Shore Road and delivered to consignees?

Q. I mean now delivery made by trunk line, not over the Shore Road; delivering to consignees in New York.

A. For all roads, all trunk line carriers west of the river, it is, of course, necessary for them to float the cars containing the silk across the river to their piers on the east side of the river for delivery to consignees.

Q. By this taking delivery in Hoboken, this floating service is eliminated in a great amount of the silk?

A. Yes.

Q. Have you any information as to the cost of the floating service per car, per ton, or otherwise across the harbor?

A. My information is not exact, of course, because I do not do any floating and I have not any exact figures in my own office as to floating costs, but the information that has come to me from time to time through various sources that I consider absolutely reliable leads me to believe that general floating costs in New York Harbor are considerably in excess of $2 per ton.

Q. Was there not a report concerning the average floating costs in 1920—the Port Authority?

A. By the Port of New York Authority. There was a report by the Port of New York Authority, and I believe that report shows $2.25 a ton.

By Mr. Carmalt:

Q. What was that report, the one that went to the governors of the states?

A. New York and New Jersey Port Harbor Development Commission—that was before it was changed to the Port Authority—July, 1920.

By Mr. Collins:

Q. To whom was it made?

A. This was made, I believe, to the legislatures of New York and New Jersey; to the Governor of the State of New York, to the Governor of the State of New Jersey.

Q. Is that floating cost, which you just mentioned, shown in that report?

A. Yes, it is.

Q. How is it shown, as an average floating cost?

A. Yes, average floating cost.

Q. Is that just the marine operation, or does it include anything else, that you know?

A. I will have to read this report over to really determine all that, but it says "average total per ton delivered $2.25¼."

Q. What page of the report is that?

A. Page 164.

MR. CARMALT: Mr. Collins, for convenience, may I suggest that a copy of that part of the report that is pertinent to Major O'Neal's testimony be made an exhibit?

MR. COLLINS: Yes.

EXAMINER TREZISE: Mr. Collins, the Examiner does not understand why you are trying to show what the cost of this floatage is in the harbor.

MR. COLLINS: I have this in mind: That the cost of delivering silk to consignees on the Hoboken Shore is so much less than—that is, delivering by the Hoboken Shore is so much less expense as a terminal service that if the trunk lines themselves delivered it direct across the harbor to consignees, because of the fact, that is, it is so much less because of this small allowance received by the Hoboken——

EXAMINER TREZISE: If the trunk lines undertook to deliver in New York it would cost them more than they pay the complainant?

MR. COLLINS: Yes, and that the complainant is incurring the difference, the deficit, by lack of the proper allowance.

EXAMINER TREZISE: Go ahead. Now, are you going to make an exhibit? When can you make that exhibit?

THE WITNESS: We can have that page copied.

EXAMINER TREZISE: Will you do that during this hearing?

THE WITNESS: Yes.

By MR. COLLINS:

Q. Can you have it done today?

A. Yes.

EXAMINER TREZISE: Can you make enough copies of that so that all the parties may have a copy of it?

MR. PIERCE: Mr. Examiner, I may have an objection to it when I get a chance to read it. By keeping silent, I do not want to be foreclosed.

EXAMINER TREZISE: You will not be.

By MR. COLLINS:

Q. Mr. O'Neal, if trunk lines deliver silk to New York Harbor, you say that the floating would be necessitated. That would not be true of all of the lines. Can you state just which ones?

A. In the case of the New York Central, floating would not be required to make delivery in New York City.

Q. Is that the only one?

A. That is the only one.

Q. As to the others——

A. As to all the others, it would be necessary to float to make delivery on Manhattan.

Q. And that average cost you have shown in 1920 was about what, $2.25?

A. $2.25 per ton.

Q. If other charges of the trunk lines in so delivering silk were approximately your own terminal charges, that is, unloading delivery, insurance, leasing, and so forth, about how much per ton would that float delivery cost?

A. By adding the terminal insurance, the policing, unloading and delivery, assuming the same cost that we have for those items, it would cost the trunk lines six dollars or more per ton for terminal service.

Q. Have you not calculated just what it would cost?

A. Yes, here it is.

Q. What is the exact——

A. I have estimated floating at $2.50 per ton for the reason that the figures that we already have of $2.25 a ton for general floating or lighterage way back in 1920 would hardly apply at this time. I believe it is much more expensive. I think we are liberal to allow $2.50 a ton. The unloading and delivery, $1.20 per ton. Those are actual cost figures. Insurance, $2.25, those are actual cost figures. Policing, twenty-five cents a ton, those are actual cost figures, or a total cost of $6.20 per ton, figuring on an average car of 40,000 pounds, or an average of thirty-one cents per hundred pounds.

Q. And still figuring on the basis of your 40,000 pound car, what would it be per car?

A. $124.

Q. That is the total cost, as estimated by you, which they would incur?

A. Yes, sir.

Q. And your own is how much per car on the same basis of calculation?

A. On the same basis of calculation, our cost is $88.93 per car of 40,000 pounds.

MR. COLLINS: I think that is all.

By MR. CARMALT:

Q. Major O'Neal, you made some study of this situation before the United States Testing Company had located its plant on your line of road, did you not?

A. Yes, indeed.

Q. Did you determine what the practice of the carriers was in handling this freight in the matter of insurance?

A. As nearly as I could possibly get it, I did.

Q. The obligation of a carrier to insure freight to its destination and delivery——

A. Yes, sir.

Q. Would seem to cast that burden on you in any case?

A. It would.

Q. And it is the practice of the lines transporting this silk in transcontinental traffic to insure the traffic while in transit?

A. Yes.

Q. And does that insurance taken out at the Pacific coast include the insurance at destination?

A. I understand it does not.

MR. PIERCE: I am afraid I will have to object to that line of interrogation, because, of course, these insurance policies are written instruments and they speak for themselves.

MR. CARMALT: I was coming to that, Mr. Pierce.

By MR. CARMALT:

Q. I will ask you if you have a policy of insurance that covers the insurance while the traffic is on your road?

A. Yes, sir.

Q. Can you furnish for the record, within a few days, a copy of the policy that you have?

A. We can furnish a copy of that policy; yes, sir.

MR. PIERCE: I would like to see it now, to know whether or not I shall have an objection to it.

MR. CARMALT: So would I, but I do not know whether he has one here or not.

EXAMINER TREZISE: You say that you would like to see it now. Do you have any objection to its being filed after the hearing?

MR. PIERCE: I do unless I can see it before. I want to know whether I am objecting to it.

EXAMINER TREZISE: The defendant is entitled to see it.

(The insurance policy is produced.)

MR. PIERCE: I understood Mr. Carmalt was asking about the insurance policy that would come at the line haul. The one that he has in his hand seems to be one covering the terminal insurance that Major O'Neal has been speaking about. I have no objection to that being filed one week or three weeks from now.

EXAMINER TREZISE: All right, you may have that filed. Will ten days be sufficient?

MR. CARMALT: I think so.

By MR. CARMALT:

Q. Mr. O'Neal, in your complaint you stated that the Hoboken Shore Railroad has an expense in connection with this traffic for its proportion of the transcontinental insurance. That does not appear in the statement that you have filed here as Exhibit 2, showing your terminal costs. Do you participate, and are you billed, for your share of the transcontinental insurance on this traffic?

A. We have not been billed with any proportion of the transcontinental insurance. Since our estimate was made and put in the petition we filed as of July 10, we have come to the conclusion that we should not pay any portion of that transcontinental insurance because the policy that we now have for terminal insurance covers it from the time that it is placed on our interchange track until the time we make delivery to consignee. If we should receive a bill for transcontinental insurance, we would decline it.

Q. Have you made inquiries before entering into the policy for terminal insurance as to whether the rate, the premium that you pay, is the same as that of the other carriers in the New York district?

A. Yes, sir.

Q. So, then, as I understand your testimony, you maintain that the trunk lines in making delivery at the New York piers, all the western trunk lines west of the river incur exactly the same expenses that you incur, excepting switching, and in addition thereto they bear the floatage costs across the river, which is more expensive than the switching on your line of road?

A. I believe so.

Q. From your investigation, do you consider that the charge made for the unloading and delivering is reasonable for the service that is performed for you by the testing company?

A. I believe it is a reasonable charge.

Q. The facility that is there offered is convenient for an efficient operation?

A. It is.

Q. In the matter of the movement from the Erie tracks to this plant, do you find it necessary to keep a track open for that particular service to accomplish a fast and prompt delivery?

A. When silk arrives, we do find it necessary to keep a track open for that purpose.

Q. Of this $9 rate from the coast, do you have copies of the division sheets between the lines?

A. Between the other carriers?

Q. Yes.

A. No.

Q. You do not know how that rate is divided between the eastern and the western lines?

A. I cannot positively say how that rate is divided.

MR. PIERCE: We are going to tell you.

MR. CARMALT: That is fine.

By MR. CARMALT:

Q. If it should develop that the insurance policy carried on the traffic while it is on transit from the Pacific coast

were made broad enough to cover the terminal insurance, including the free time to the delivery to the consignee, that would wipe out about half of the cost that you show in your Exhibit 2, would it not, as being necessary for you to carry?

A. Yes, sir.

Q. And you are perfectly willing, I assume, to amend your divisions if and when the trunk lines accomplish the development of such an insurance policy?

A. I should be delighted if I could receive that assurance.

MR. CARMALT: I think that is all.

EXAMINER TREZISE: You may cross-examine, Mr. Pierce.

CROSS-EXAMINATION.

By MR. PIERCE:

Q. Mr. O'Neal, your line of railroad extends from over beyond Second Street to Eighteenth Street; is that right?

A. About that, yes.

Q. And about how far is that, sir?

A. That is a little more than a mile.

Q. Do you have industries located all along that line of railroad that you serve?

A. Yes, sir.

Q. And they receive and forward freight, do they, all of them?

A. Yes, sir.

Q. Your freight warehouse, you say, is at the point marked "C," that is, Fifth Street?

A. That is our local freight delivery station.

Q. Do you do any service on your railroad except a so-called switching service?

A. Yes, we do more than switching.

Q. What service do you do?

A. We do a general railroad business.

Q. That is, you do a line haul service and a switching service?

A. It might be so called if you consider a line haul within a terminal.

Q. What I had in mind was whether you, in this calculation that we will come to later, considered all of your service as switching service or whether there was some part which was switching and some part which was not?

A. We certainly perform other service than switching, that is, in addition to switching. In some cases we load and unload cars for export and import of freight, and, of course, on all l. c. l. freight we must load and unload the cars, store the freight and effect the delivery.

Q. Do you have any ferry car operations, so called, on your road?

A. Yes, we have some ferry car operations.

Q. In those, do you load or unload or does the consignee and shipper load and unload?

A. We have a special arrangement with ferry cars whereby the consignee performs the loading or unloading, but we do the checking.

Q. When you were contemplating getting this silk industry——

MR. CARMALT: Mr. Pierce, do you mind defining what a "ferry car service" is?

MR. PIERCE: Ask the Major.

MR. CARMALT: It is not quite clear to me, for the purposes of this record, just what a ferry car service is?

By MR. PIERCE:

Q. Major, you tell him, will you, please, sir?

A. A ferry car service is variously interpreted. Our own ferry car service was designed for the purpose of accommodating certain large shippers of small package freight so that they could take a car at their warehouse and hold it all day long and load it as they get their packages

ready. We put in a tariff by which that was permitted. We would put in a checker there to check the car and when the car is loaded, the checker seals the car, the papers for all of the shipments, there might be fifty or more shipments in the car, are sent to the freight office, billing is made out, and the car is switched to our connecting line. For that service we get the usual l. c. l. freight rate.

By Mr. Carmalt:

Q. But in your Exhibit 2 you have included none of the charges except those that were incident to the switching of the ferry car along with all other cars that are moved in switch service.

A. We included all cars in the switching service, figuring only the switching.

Q. You did not include in any part of your operating expense in Exhibit 2 any of the loading or unloading or incidental costs?

A. No, that does not enter into the switching cost.

By Mr. Pierce:

Q. Your switching cost, then, as you have shown it here, represents what?

A. Purely the cost of switching, the various items that enter into the cost of switching.

Q. Have you those items here, the details of this amount?

A. I can tell you what those details are; yes, sir. I have some figures to show it. I have not made an exhibit of it.

Q. The details going up to make up the $187,714.

A. I don't know what that is.

Q. That is your total switching cost for the year 1925 as shown by your Exhibit 2.

A. Oh, yes.

Examiner Trezise: That is $187,714?

Mr. Pierce: Yes.

THE WITNESS: I see what you mean. I have that.

By MR. PIERCE:

Q. Have you got that in the form of a statement?

A. I have it in the form of a statement where we prepared an analysis of all of our expenses for a whole year, allocating those expenses to the various services that we perform. For purely switching service, we showed a total of $187,714.08.

By MR. COLLINS:

Q. That has been a portion of your total operating expenses?

A. That is merely a portion of the total operating expenses.

Q. That portion which is directly chargeable to switching?

A. That portion which is directly chargeable to switching, that is correct.

By MR. PIERCE:

Q. Now, have you the details which go to make up this $187,714?

A. Yes, I have those details. Rentals, taxes——

Q. Just call off the amounts.

A. Rentals, $30,908. Taxes, $45,806. Coal, $5692.63.

Q. Just leave off the cents. I want to get it in round figures.

A. Electric current, $3934. Repairs to locomotives, $4894. Depreciation on locomotives, $1668. Maintenance of way and structures, $25,875. Maintenance of equipment, $15,591——

Q. If I can interrupt you there, did that include maintenance of cars as well as of your locomotives?

A. It would include maintenance of cars, but we have no cars of our own. We may have made repairs from time to time to somebody else's cars, very light repairs. It would include maintenance of electric trucks. We have a fleet of

electric trucks that are in this service—no, I beg your pardon, I am wrong. The electric trucks would be charged to loading and unloading and not to this service. The items of transportation, $8846, and wages in switching service, $44,496.

By Mr. Collins:

Q. Now, are those all the items?

A. Those are all the items.

By Mr. Pierce:

Q. When you were considering getting this industry to locate on your line and when you had concluded to get them located there, did you make an arrangement with them under which they performed this unloading and delivery service that you speak of?

A. Let me correct one thing: I did not get them to locate there. They located there before I knew it.

Q. I thought you got them to come over.

A. After they had located there, that is, after they had made all of their arrangements and purchased the property and had been discussing railway service with somebody else than me, then they came to me and we found that we had to do something. They had a very large investment there and they were going to give us freight traffic. So we took a good many months to figure around just what was the best arrangement to make. We realized that our own facilities were entirely inadequate to take care of this valuable commodity, to properly safeguard it, but that the facilities they were providing were quite ample and could be made to meet our own need as well as their own. So we proceeded to make an arrangement with them whereby we use a portion of their warehouse for the storing of the silk so long as it belongs to us for the forty-eight hours, and an agreement whereby they would, with their own labor, perform the unloading under the joint supervision of our company and their company, and they were to make us a charge as to the

actual cost of the service and no more, actual cost of unloading it, storing and delivery to the consignee.

Q. They make a charge for the storage service, do they, that is, for the warehouse space?

A. Yes, they make a slight charge for the storage.

Q. Is that included in the item of rents, that you gave, $30,000?

A. No, this item of rents, $30,000, refers to the entire rental charge for a year, for the year 1925. We had not handled any silk at that time.

Q. Do they give you a receipt for this silk immediately upon unloading it from the cars?

A. It is receipted, yes. We have a check sheet and a receipt immediately upon the car being unloaded. They sign our check sheet and then if the freight remains in storage after forty-eight hours they give us a warehouse receipt.

Q. I recall your saying that. Then, between you and this testing company, do you consider that they or you are liable for this silk when it is unloaded and when they have given you this receipt?

A. We cannot shift the common carrier liability that rests upon us for a period of forty-eight hours.

Q. I say as between you and them. I am not referring to the shipper, who, of course, would look to you, but as between you and the testing company.

A. As between the railroad company and the testing company, who is liable?

Q. Yes, sir.

A. One to the other?

Q. Yes, sir.

A. Well, the testing company is liable to us.

Q. Major, I take it that this silk, when it is put on the interchange track, is moved by you over this track which is nearest to Park Avenue?

A. No, not necessarily.

Q. Which track would you put it on, then?

A. The interchange——

Q. You say you have an open track for the silk when it has been delivered or know it is coming.

A. Yes—in making the final delivery to the warehouse there, I believe, we do use the outside track, but when the silk is placed on our tracks, it is not placed on the outside track. We run about half-way the yard before going to the outside track. We have a track right through the middle of the yard.

Q. So that when you said an open track, did you mean that you must have an open track so that this silk can be moved over to the outside track and then put on the plant?

A. Necessarily, at the time of delivery, we must clear a track to make the delivery.

Q. And that is all that you mean by that statement as to an open track?

A. Yes.

Q. That you had to have a track clear in order to move the silk over?

A. We have got to clear a track to move the silk.

Q. You get these cars in lots of two, three, four and five, sometimes?

A. Anything from one to six, so far.

Q. And you can place three of them at one time?

A. We can place three baggage cars on the siding at the warehouse at one time.

Q. How long does it take the testing company, acting for you, to unload this silk after it has been placed?

A. Actual unloading usually runs about an hour, I believe. It may run a little more, it may run a little less, because the tonnage in the car may be more or less. It will vary somewhat.

Q. How long—would you say as a general rule how much of your silk is delivered to the consignee as distinguished from the testing company before the forty-eight hours expire.

A. There is no general rule as to that. I cannot say how much, I really do not know.

Q. You have no idea as to how much is delivered before or how much is delivered after the expiration of the forty-eight hours?

A. I have nothing with me right now to say that. I could not say that exactly. I could not even say approximately.

Q. If it is not prying into the testing company's business, they are here and they can stop——

A. I think they can tell you more nearly than I can.

Q. Do they examine this silk—I use the word "test" because that is their name—or test it or do anything in that respect to this silk for the consignee during this forty-eight hours?

A. Not that I know of. I believe they test the silk, of course, but only upon request of the consignee.

Q. I would understand, of course, that it was only done on the consignee's request.

A. They do not test it on delivery.

MR. CARMALT: We will put a witness on to tell you the whole story.

MR. COLLINS: May we have this clear; that there is no testing of the silk until after it is delivered to the consignee; is there?

MR. O'NEAL: We do not authorize any testing.

MR. PIERCE: That is all.

EXAMINER TREZISE: Are there any further questions?

RE-DIRECT EXAMINATION.

By MR. CARMALT:

Q. Major O'Neal, when you say as between the testing company and you, that the testing company is liable during the time that the goods are in their hands——

A. Only as an employee.

Q. You mean that that is the ordinary arrangement of an agent with his principal?

A. Exactly.

Q. You carry the insurance?

A. We carry the insurance, we are amply protected in this respect.

MR. CARMALT: That is all.

By EXAMINER TREZISE:

Q. Mr. O'Neal, this cost charge that you have shown, that is the average cost for switching, is it not, per car?

A. Yes, sir.

Q. Is it average cost per car?

A. That is the average cost per car for switching, yes, sir.

Q. And in that average you have included the cars that move from the Erie connection to the local freight office, eighteen or twenty blocks?

A. We include all cars.

Q. And the question naturally arises, is it your opinion that the cost of switching for two or three or three or four blocks to the warehouse would approximate the cost of switching from that same connection to the local freight house?

A. I believe, Mr. Examiner, that the distance has very little to do with it. You have got to make the connection and in the case of this silk you have got to leave other business even to do it. You have got to connect the engine up to the cars, you have got to stop them, you have got to disconnect them. The distance to the downtown points might be five or six minutes longer, but the actual service is about the same.

Q. Then you do believe that the cost would be approximately the same for switching this as for switching cars to the local freight station?

A. Yes, sir, approximately the same.

Q. Your figures cover loaded car movement. Do they also include cars that contain less-than-carload freight of a small amount to the local freight station?

A. Our estimate includes, while based on loaded car movement, all cars. We figured all cars in order to arrive at this average.

Q. And you do keep a record of these cars that contain the less than carload freight to and from the local freight station?

A. Yes, sir.

Q. And that is included, as you have stated?

A. Yes, sir.

Q. Do your figures include supervision of the switching?

A. Yes, sir.

Q. That is, you have a yardmaster down there?

A. We have a superintendent. We include in that the superintendent.

Q. And your switching also includes the setting of cars that contain these less-than-carload shipments at the local freight station regardless of the number of moves?

A. Yes, sir.

Q. Do you require more supervision at the local freight station than at the other points?

A. For the switching operations, you mean?

Q. Yes.

A. We will require more supervision for the silk switching than we will for any other.

Q. You have an agent at your local freight station?

A. Yes, sir.

Q. Your figures have included a person or an average expense for his wages?

A. It does not include any part of his wages.

Q. Does he not have charge of the billing on this traffic?

A. He does, but we are considering that purely as office expenses, not chargeable to switching. The agent is not in charge of the switching operations. He is in charge of the billing arrangements, and such as that, but that is not a part of the switching charge, as we see it. We eliminate

that from the switching cost. We are only charging to switching cost those actual items that enter into switching.

By Mr. Carmalt:

Q. Just specifical switching, as I understood your testimony.

A. Just specifical operations.

By Examiner Trezise:

Q. You spoke of the superintendent. Of course, that would not be the physical operation.

A. I should say it is. They are in charge of it all the time. He is in charge of all of the outside operations. Possibly we may have left out some items that should go into this switching expense, but if so, it is to the benefit of the other side.

Mr. Collins: Mr. Examiner, may I state my understanding of Major O'Neal's calculations was his total expenses for the year 1925, and then those expenses allocated to the several services by a per cent., that is, one service was such a per cent. of the whole, and another service was such a per cent. of the whole, and this switching drew a certain per cent. of the expense; that is, of the whole expense. I do not know just what details went in. Perhaps some of the overhead goes in here as other items. He includes here transportation which, in my judgment——

The Witness: That may be true. It includes overhead other than items shown.

Examiner Trezise: Yes, he has included maintenance and depreciation and other items independent of the actual mechanical switching operation.

By Examiner Trezise:

Q. And you, of course, in that calculation, you have estimated that it costs just as much to switch a light car as a heavy car?

A. Yes, sir.

Q. And it costs just as much to switch the length of your railroad—how long is that?

A. About a mile and a quarter in length.

Q. What is the distance from the Erie connection to that warehouse there?

A. Two city blocks.

Q. And you estimate in your calculations that it would cost just as much to switch silk to that point as it would cost to switch any car?

A. I should say approximately the same.

Q. You think that is a fair calculation?

A. I think it is a fair calculation. Of course, you must realize that it may take five minutes less to switch to the silk plant than it does to switch downtown. On the other hand, it will take a whole lot longer to switch around to the float bridge and stop cars on float. But I can say the average cost is the same; there is very little difference.

By Mr. Carmalt:

Q. Major O'Neal, where is the major part of your switching movement? Is the bulk of it handled through the Fifth Street freight house?

A. The bulk of our switching is handled around in the vicinity of the silk plant.

Q. The Hoboken Terminal Warehouse, for example, is a very large receiver of government freight?

A. Yes.

Q. And that is right in that vicinity also?

A. Yes, sir.

Q. What do you handle in the Fifth Street house; anything more than l. c. l. traffic?

A. Nothing besides the l. c. l. traffic.

Q. That is a relatively small amount of the whole?

A. That is a small amount of the whole. Of course, we handle cars from the steamship piers all up and down the waterfront, but I should say it really costs less to handle

it a greater distance because we can put ten or twelve cars in a cup and move it, whereas the switching operations around the silk plants, you can only handle two or three cars at a time. It really costs more, I believe, to handle the short haul than it does the longer haul, because in the longer haul you have got a greater number of cars in your train and the cost is less per car.

By Examiner Trezise:

Q. In 1925, you had over twelve thousand cars that you handled?

A. Yes, sir.

Q. What per cent. of those were handled to the vicinity of the warehouse and the Erie connection? Could you estimate that from your knowledge?

A. I think I can very closely approximate that. I find that 20 per cent. of our carload traffic was handled to the piers other than in this immediate vicinity, and 8 per cent. of station freight, or a total of 28 per cent. was handled beyond the immediate vicinity of this plant.

By Mr. Collins:

Q. In other words, 28 per cent. of your switching was done to the longer distance?

A. Yes, and, of course, 72 per cent. in this immediate vicinity.

Examiner Trezise: I believe that is all, thank you.

By Mr. Pierce:

Q. Just what territory do you have in mind when you use the phrase "this immediate vicinity," Major?

A. I mean the vicinity north of Fourteenth Street.

Q. But including the space here that is marked "float bridge"?

A. Including that space.

Q. And the Scandinavian American Line?

A. Yes, including all that factory terminal building; all that is in the immediate vicinity.

By Examiner Trezise:

Q. Your point "A" on your map, Exhibit No. 1, is that Hoboken or Weehawken?

A. That is about on the line between Hoboken and Weehawken. I don't know exactly where the line is, but we only pay taxes in Hoboken, so I do not think it gets into Weehawken.

Examiner Trezise: If there is nothing further, you may be excused.

(Witness excused.)

JOHN M. BAKER was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

By Mr. Collins:

Q. What is your business, Mr. Baker?

A. Insurance broker.

Q. And as an insurance broker, do you handle—have you heard the previous testimony here?

A. Yes.

Q. Do you handle such insurance as this terminal insurance on silk?

A. I do.

Q. For whom?

A. We handle various commodities other than silk at terminals, and silk also. We handle all the business of the Hoboken Manufacturers' Railroad Company.

Q. And in writing such insurance, do you write policies or handle policies for a great number of different insurance companies?

A. We do, for a great many concerns through a great many companies.

Q. In this policy you have written for the Hoboken Manufacturers' Railroad Company, at what point does the silk become insured under that policy?

A. Immediately that it comes on the property of the Hoboken Shore Road and in the custody of the Hoboken Shore Railroad.

Q. When does that insurance expire?

A. The policy reads that the coverage expires when the liability of the railroad ceases.

Q. If the silk is delivered by the railroad to the consignee within, say, six hours after the railroad has taken custody of the silk, then what would be the situation as to the policy?

A. Coverage ceases, because the railroad's liability is ended.

Q. If the railroad company held the silk in its custody for forty-eight hours, of course, then your policy covers its liability that far?

A. Yes.

Q. What general type of policy is it?

A. It is what we call a transit contract.

Q. As to liability, what type is it?

A. Legal liability.

Q. General or special or what?

A. This is a special form of full legal liability coverage.

Q. Would it include fire, theft and burglary.

A. It would include any loss that might occur for which the railroad would be liable.

Q. The premium on this policy is how much?

A. One and one-half cents per one hundred dollars.

Q. Could a lower rate of premium be obtained by the railroad company if it had fire insurance separate in a single policy and burglary insurance in another, or do you know?

A. I do not know whether it could or not, but I do know that it is absolutely impossible to obtain sufficient burglary coverage unless it is bought under this form of insurance.

Q. What can you say of this policy from your knowledge of this type of insurance as to the reasonableness of its premium in cost to the railroad?

A. I had better tell this in my own story.

Q. Go ahead.

A. When this original proposition came up, we submitted to the companies who now have the transcontinental insurance the question as to whether that policy could be extended to cover on the premises of the Hoboken Shore Railroad and in the warehouse of the United States Testing Company until the liability of the railroad had ceased, and the companies sent their inspectors over, and I have a copy of the report submitted by these companies in which they advised us and also most of the silk people of New York who were interested, that they would not accept the risk even at a rate of one and a half cents per one hundred dollars, because of the tremendous liability of burglary. We thereupon issued separate insurance in companies other than those representing the transcontinental carriers in the amount of $1,100,000. That does not mean anything, because we merely pay each company that carries part of that $1,100,000 their proportionate share of the rate of one and a half cents per day. We were unable to obtain coverage beyond the $1,100,000 because there are a great many companies in New York who carry re-insurance on the transcontinental original policies. Within the last week I have taken up as a feeler with one of the main offices in New York who have part of this contract the question of reducing this rate, and I am submitting a letter, dated November 17th, from them in which they state that they could not entertain this business at any lower rate. This office represents seven of the largest companies doing business in this vicinity.

Q. By "this office" do you mean the office which gave you that response?

A. This agent, this insurance agent who represents seven companies.

EXAMINER TREZISE: Mr. Collins, you do not mean to submit it as an exhibit in this case, do you?

MR. COLLINS: I do not think it is necessary.

By Mr. Collins:

Q. Did you want to put that in?

A. I don't mind. I think it might show a thought there.

Examiner Trezise: If you want to introduce it, you will have to have the necessary copies made.

Mr. Collins: I think we had better let it go without offering it.

Examiner Trezise: Very well.

Q. You spoke of transcontinental insurance. Have you any information with respect to the rate of premium of the transcontinental insurance as compared with the rate you are charging the Hoboken road?

A. Yes, we were advised that the transcontinental companies paid a rate of four cents per one hundred dollars for the trip, but that the trains that came through were fully armed and guarded and traveled at an average rate of approximately one hundred miles an hour until they reached the port of New York.

Q. How much per hour?

A. One hundred miles, that is what they told us. It is a three and a half day trip according to the insurance companies, special cars, special routings.

Q. What was that rate; four cents?

A. I did not mean an average; I mean a maximum rate of one hundred miles an hour. These same companies that carry the transcontinental insurance refuse to take the risk at the Hoboken end at the rate of one and one-half cents.

Q. They wanted more or less?

A. They would not take it unless we put up guards and fences and reduced the liability. In addition, I am advised that the Lackawanna Railroad pays this same rate for the same form of coverage at their terminal point in New York.

Q. Are you at liberty to tell us how you obtained this information?

A. We asked the insurance companies that carried the contract.

Q. In your direct dealings with those insurance companies, this information comes to you.

A. As a matter of friendship, they advised us. The Lackawanna paid the same rate for the same coverage at their terminal point for silk.

By Mr. Pierce:

Q. Terminal point where?

A. In New York.

By Mr. Collins:

Q. Can you say from your knowledge whether the Hoboken Railroad Company could get a lower insurance protection here, that is, at less expense to it than it is now obtaining?

A. I can say positively not at this time. It might be that after the companies have had this experience for a year or more without sustaining any loss, they might be inclined to give what is known as an experience credit and reduce the rate. After all, the companies figure their liability at approximately $300,000, which is the value of a car of silk, and at a rate of one and one-half cents, their maximum premium for the year cannot exceed, will say, $35,000 to $40,000 premium. So it is a ten to one chance in the year to come.

Mr. Collins: That is all.

Examiner Trezise: Any cross-examination?

Mr. Pierce: No cross-examination.

(Witness excused.)

MORGAN W. O'BRIEN was thereupon called as a witness, and having been duly sworn, testified as follows:

Direct Examination.

By Mr. Collins:

Q. Mr. O'Brien, what is your occupation?

A. Superintendent of the Hoboken Shore Road.

Q. Of the what?

A. The Hoboken Manufacturers' Railroad. That is the pet name, "Shore Road."

MR. CARMALT: Mr. Collins, I have noticed that one or two of your witnesses have mentioned this as the Hoboken Shore Road. Is that a pet name or is that the real name?

THE WITNESS: That is the pet name.

MR. CARMALT: But it means the same thing?

THE WITNESS: It means the same thing, the Hoboken Manufacturers.

Q. In your work as superintendent of this road, do you have actual charge of the supervision over switching of silk shipments?

A. I do over all the operations.

Q. Can you tell us some of the things that you have to do in connection with this silk shipment when it comes on the road until it gets to the warehouse?

A. At present we are notified by our yard man up at the upper yard by phone at our yard office who immediately notify us when any silk comes on. Then we send a checker up, also a yard clerk, and I myself, if I am around the vicinity, go up there and stand by it. If I am not, our master mechanic will go up and he will supervise the handling of the car while it is being placed on the siding and probably stand around there and wait until the car is unloaded or see that there is enough of our men employed around there to keep their eye on the silk.

Q. By "keeping their eye" on it, you mean protecting it and guarding it, for instance?

A. Yes.

Q. What is the first thing that is done when the cars come on the tracks?

A. The first thing that is done, we have our yard man at the upper end of our yard to immediately take the seals off the car.

Q. What do you mean by "taking the seals"?

A. Getting the car and taking all the seal numbers from the side and end doors, and if there are any doors on the roof of the car, if it is a refrigerator car there are seals there, and he must also get them. Our checker must do the same. Also our yard clerk. So we have three records of the seals of that car coming on our road before we accept it for the interchange road.

By Mr. Carmalt:

Q. That seal record includes a seal by each of the carriers that handled it on the transcontinental trip?

A. Yes, sir.

By Mr. Collins:

Q. After you have taken the seal and during the time that you have taken the seal, the car has just come on your track from the Erie connection; is that right?

A. Yes.

Q. And you have about four men standing around?

A. We have always four men standing around watching that car of silk.

Q. When you are advised by telephone that this silk has arrived. By the way, who gives you that advice?

A. Our yard man up in the upper yard.

Q. Suppose you are engaged in some other switching operation at the time on your own road, do you wait until you have finished that ordinarily, or how do you manage that to get to the silk?

A. If we are waiting on a float and we have got half of the float pulled and the other half waiting to be pulled, we keep right at that; but we drop everything else outside of float work and take care of the silk so as to get it in and get it unloaded. Our responsibility ceases when we get it in the warehouse with the exception that we have to keep

our night watchman watching the warehouse just as well as everybody else.

Q. A night watchman of the railroad company?

A. Yes.

Q. He includes that in his rounds?

A. He includes that in his duties.

Q. About how long, if you can state, does it take on an average to make one of these switch movements including your checking and taking the seals and all those things?

A. I figure after the seals are taken that the engine can couple up and shove the car in the siding in about fifteen minutes.

Q. You say after the seals are taken?

A. After the seals are taken. Of course, it takes about ten or fifteen minutes to get all those seals before the car is moved. The car dare not be moved until all the seal records are complied with.

Q. Taking the switch movement as a total operation, have you any way of estimating how much time it would consume?

A. I figure that on the cars that we are handling there now that it is about an hour and a half of an engine crew's time and everybody else time on one car, because he goes in places the car and has to come back again.

Q. Who is "he" in this case?

A. That is the engine crew.

By Mr. Carmalt:

Q. When he comes back, he pulls the empty out?

A. Right.

By Mr. Collins:

Q. Is he free to go to any other task while this silk is being unloaded?

A. Of course, he does lose a little time at the silk plant. If they say they are going to have this car out in fifteen minutes and he can place another one on the siding, he will stay there to do it.

Q. How many men constitute an engine crew?

A. Five.

MR. COLLINS: That is all.

By MR. CARMALT:

Q. Mr. O'Brien, this traffic mostly comes to you in baggage cars, does it not?

A. Yes, sir; the majority of it in baggage cars.

Q. You have been in the railroad service for a long time?

A. Some twenty odd years.

Q. Mostly in New York terminal work?

A. Hoboken Shore all the time.

Q. Are you able to judge on the question of whether or not the service that is given by that road on that traffic is as efficient as the other roads in the region?

A. We have been highly commended by the other roads on the way we have handled the cars after they arrive at our plant by putting them in on the siding so that their records would show that the car arrived at destination in a certain length of time.

Q. And time, they tell you, is an important item in handling——

A. Yes, very important.

MR. CARMALT: That is all.

CROSS-EXAMINATION.

By MR. PIERCE:

Q. Mr. O'Brien, do you get any advance notice from the Erie that this silk is to be delivered about such and such a time?

A. No, not at all times; on occasions we do.

Q. Do you have these guards employed regularly?

A. No, sir.

Q. How do you pick them up so quickly?

A. These are our shop men and our yard clerks that we put on this special movement to protect it until such

time as we are able to employ guards when this silk gets running properly.

MR. PIERCE: That is all.

EXAMINER TREZISE: Are there any further questions?

RE-DIRECT EXAMINATION.

By MR. COLLINS:

Q. Mr. O'Brien, may I ask another question: Your own people, your clerks, watchmen, and so forth, checkers and yourself, have to quit other duties, though, to come back to this silk?

A. Oh, yes.

Q. So that you lose your time from other duties when you are assisting in the delivery of silk?

A. Yes, that is what I say, that my time is taken up.

Q. Do you work overtime in connection with the silk?

A. We have on occasions; we have put in hours overtime at night placing silk and having it unloaded.

Q. And do you do that in connection with other traffic?

A. No.

Q. Why do you do it in connection with silk?

A. Because we want to get it out of the cars and have it stowed under cover some place.

MR. COLLINS: That is all.

By MR. PIERCE:

Q. That is a new line of inquiry. Don't you have any restricted hours for the receipt of this silk?

A. We have received as many as ten or eleven cars at four o'clock in the afternoon—I say ten or eleven; I am wrong. Seven cars. And, of course, before we quit that night we had to get them all unloaded. We have got time up to five o'clock and if they shove ten on you at ten minutes of five, it means that they have got to be unloaded.

Q. That is not the hour, is it?

A. Five o'clock; seven to five in the evening, I believe, is the time.

Q. You are quite sure of that?

A. Yes, sir.

Q. The notice you sent out is a little different.

A. That is the notice I heard. I have ordered my men to receive up to five o'clock and I believe Captain O'Neal is the one who issued the orders.

EXAMINER TREZISE: Are there any further questions?

MR. PIERCE: That is all.

MR. COLLINS: That is all.

(Witness excused.)

(Whereupon, at 12:30 P. M., a recess was taken until 1:30 P. M.)

AFTER RECESS.

1:30 P. M.

DANIEL E. DOUTY was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. CARMALT:

Q. Mr. Douty, you have given your name and address to the reporter?

A. Yes, sir.

Q. What is your official position with the United States Testing Company?

A. I am the vice-president and general manager.

Q. Will you say what the United States Testing Company is, what its corporate organization is, how it is made up, and what its purposes and functions are?

A. The United States Testing Company is a laboratory service company making weighings and making tests especially for the silk industry and maintaining a textile warehouse for the textile industry.

Q. And those tests go to all operations of the silk textile industry?

A. In the case of silk, we serve practically all branches of the industry.

Q. And that includes the testing of the raw silk as it is imported?

A. Yes, that includes the weighing and the testing of the raw silk as it is imported.

Q. When was the testing company organized?

A. The testing company was organized in 1907.

Q. And under the laws of what state?

A. Incorporated under the laws of the State of New York.

Q. And who make up your board of directors?

A. The board of directors of the testing company is representative. It contains silk men, cotton men, woolen men, and then dyers, throwsters, the correlative branches of the industry.

Q. It has been suggested from questions of the other side that in some fashion delivery to the testing company represents in some way delivery to the consignees. Will you first state what is the relation of the testing company to the Silk Association of America?

A. The testing company has not any organization connection with the Silk Association of America. It is a member of the Silk Association, but it has no legal connection, that is, no official connection. The officers of the testing company and some of the members of the board of the testing company are likewise officers and on the board of managers of the Silk Association. The testing company

was organized for this service by the leading and prominent men in the industry and naturally the two organizations have men on both of their boards, but there is no official connection between the association and the testing company.

Q. The Silk Association of America is made up of whom?

A. The Silk Association of America is a trade association, containing in its membership all of the branches and the correlative branches of the silk industry. It includes the raw silk men, the importers, the manufacturers, the dyers, and the throwsters and all branches of the industry. It is a broadly industrial representative organization.

Q. It is not confined at all in its membership to the importers of raw silk?

A. Oh, no. The importers only form one small section of the Silk Association.

Q. And, as I understand it, the United States Testing Company in its laboratory service does work for the throwsters, for the manufacturers in various stages of the manufacture of silk as well as of the raw silk?

A. The testing company will serve anybody. It is a public institution and it is not limited at all to the membership of the textile associations. It is a general service organization and will serve anybody who makes application to it for its service. It is a neutral organization.

Q. In addition to its laboratory tests for the industry, does the testing company also warehouse for members of the Silk Association and for others?

A. The testing company warehouses for anybody, but limits its warehouse activities to textile materials. We do not do a general warehousing business except in the textile field. But the warehousing is not limited to silk. We will take cotton goods or woolen goods, but we have a specially prepared warehouse for taking care of textiles and textile materials.

Q. Prior to the current year, where was the Testing Company's laboratories located?

A. We were located at 340 Hudson Street and 316 Hudson Street.

Q. New York City.

A. New York City, yes.

Q. Those were separate buildings?

A. We had three buildings. The plant was distributed over three separate buildings.

Q. Did you also conduct a warehousing business there?

A. Yes.

Q. Have you still those buildings?

A. We have the buildings—we have rented a portion of the buildings. We still have one floor occupied. The remainder of our property is either sublet or vacant.

Q. And you have removed the laboratories from those buildings?

A. To Hoboken, on the final moving on the first of September.

Q. And that is the plant about which testimony was given here this morning?

A. Yes.

Q. Located on the line of the Hoboken Manufacturers Railroad?

A. Yes, 1415 Park Avenue.

Q. Won't you tell to the Commission what was the purpose of the removal to Hoboken from New York City?

A. There were a good many reasons why we wished to change our location, but the principal reasons were, first to obtain direct rail connections. The Testing Company warehouses a large proportion of the raw silk brought into New York, and it had to all but truck it to our warehouse on Hudson Street. We wished particularly to obtain facilities for direct delivery in car lots from all of the carriers.

Q. Concentrated at one place?

A. Concentrated at one point.

Q. The deliveries prior to that had come to you from the several railroad piers?

A. Yes.

Q. Located along the Hudson River on the New York side?

A. All merchandise had to be trucked to us from any railroad, both from the piers and from the New York Central Station at St. John's Park.

Q. I interrupted you in the course of your discussion of the various purposes of your removal.

A. The first and chief purpose, as I have stated, was to place our warehouse with rail connections where we could get the silk delivered in carload lots or directly by train on our own property, especially to cut down the banditry hazard and to expedite shipments. Under the arrangement under which we were operating, it was necessary to await the trucking of the silk to our warehouse before we could reship. If we could obtain a point at which the silk could be delivered directly to us in car lots we could save from twenty-four to forty-eight hours in the reshipment of the silk to the mills. That is a very vital element in the transportation of the raw silk.

The raw silk is hurried across the continent at a very high rate of speed and at very large expense, and then a great deal of time is lost in New York in the trucking and the reshipment, and we especially wished as an industrial advantage to concentrate these shipments from a point on the other side of the river where we could get connection with all carriers.

Q. That attempt to concentrate the delivery and reshipment worked to the benefit of the silk industry to some extent, I suppose?

A. Yes; we felt that it was an industrial saving, reduction of waste, as Secretary Hoover would put it, to the entire industry, including the carriers. Of course, in this we assumed that the carriers would have a considerable

advantage in direct shipment, especially those carriers which terminate on the west side of the Hudson River.

Q. I am coming to that in a little more detail. But it was a very great saving of economic waste to the industry as a whole?

A. That is the way we interpret it.

Q. You interpreted it in that fashion?

A. Yes.

Q. There has been a very great activity here in New York harbor by the Port of New York Authority and its predecessor to eliminate wasteful movements of transportation in commodities, commodities moving in transportation; is not that true?

A. Yes.

Q. Did you consult with the Port Authority when you made your location on the west side of the river?

A. Yes; after we studied the problem on the east side of the river, and determined that a greater saving of waste could be made by putting our warehouse on the opposite side, then we consulted with the Port Authority after having made a rather study of the comprehensive plan as published in two successive annual reports, and the various belt line arrangements upon which the Port Authority were working, we decided to attempt to locate our warehouse on the west side because it would be in accordance with the comprehensive plan.

After we had made that decision, I consulted personally with members of the staff of the Port Authority, and we assured ourselves that the plan which we were working on was in accordance with the comprehensive plan of the Port Authority.

Q. Did you take this question up in any fashion with the railroads when you arranged to make that purchase in Hoboken?

A. In the early part of our study we had conferences with some of the representatives of the railroads to determine if, in the first place, there would be any difficulty in

the shipping, in the segregation of these shipments at Pacific Coast points in cars for delivery in Hoboken; furthermore, to determine if there were any obstacles in the delivery of these cars on the west side of the river.

Q. Won't you stop one moment to state what the policy and plan of shipment is from the Pacific Coast terminal to the East? Is the traffic, any of it, routed?

A. The general routing, as I understand it, is less largely to the steamship companies. The consignees at present do not route silk. I believe this is based upon the theory that best service can be obtained and it is to the best interests of all parties concerned, to have all of the silk or from any one ship routed by one road in order to be gathered into train loads and to expedite the transit.

Q. That is the only way, or at least the most expeditious and most convenient way of getting it expedited to New York?

A. That has been the policy of the silk association, not to route the silk as long as the service apparently could be carried out to the best advantage by not routing it, leaving the distribution to the carriers and to the steamship lines.

Q. That is done by delivering whatever is in a cargo arriving at the western port to a single line for transportation to the East?

A. I think that is the general practice now.

Q. And it goes in a solid train without breaking all the way to the Atlantic Seaboard, is that your understanding?

A. I don't think that is correct, because there are certain large consignees in the Middle West that do have some of those shipments split off. It does start from the coast on a single road, but there are points like Chicago, Milwaukee and Rochester, and some other points, at which silk is diverted. It does not come to New York.

Q. But such of it as comes to the seaboard remains in a train ordinarily?

A. Yes, it travels as a solid train.

Q. Did you have in mind also in locating over there—You have indicated in detail the saving to the industry of having the location on the west side—the saving to the railroad, in your judgment, by locating your warehouse on the west side of the Hudson?

A. We had every reason to believe that the location on the west side would make a very material saving to the carriers in delivering direct to us, and we further had in mind the redistribution by rail from the west side without the necessity of double-carry across the Hudson River.

Q. Some of it goes out from the warehouse on the west side by railroad, does it?

A. Yes, a portion of the traffic from the west side goes out by freight and express.

Q. And that moves by direct handling to the railroad cars?

A. It moves by direct handling to the railroad stations and by direct collection at our plant by the express company.

Q. In this inter-relation between the Silk Association of America and the testing company, what have you to say about the proposition that a delivery to the testing company constitutes a delivery to the consignee? Does any of it come consigned to the testing company?

A. No. Under the present arrangement, the delivery by the Hoboken Manufacturers Railroad to the testing company does not constitute a delivery to the consignee.

Q. The freight comes consigned to the individual importer?

A. Yes, or the modified bill of lading.

Q. He may or may not be a member of the Silk Association of America?

A. Yes—no, it is not limited to the membership.

Q. The importer may or may not be a director or stockholder in the United States Testing Company?

A. Yes—not necessarily a director.

Q. And is he even necessarily a stockholder?

A. No; not necessarily. The service is open to anyone.

Q. Is there any difference to the railroad in the handling of the traffic through the warehouse in Hoboken than if handled through their own warehouses, New York side?

A. I can see no difference, because, as we perform our functions with the railroad company in Hoboken now, we are virtually agents of the Hoboken Manufacturers Railroad. We receive the goods, perform the service and hold those goods subject to the railroad's order.

Q. And no service is done by the testing company in Hoboken that is not done by the trunk line carrier if it makes delivery in New York on its own pier?

A. No.

Q. You said that you consulted some of the railroads in connection with the location over there. Was any objection raised by any of the lines?

A. No objection was raised in our early investigation, and, as a matter of fact, after we located there the plan was approved by several with whom we talked informally. I don't mean to convey the impression here that we took this investigation up with the higher officials of the company, but they were men authorized to furnish information and in touch with the operations of the railroads.

Q. Major O'Neal, in the course of his testimony, cited the fact that this was a saving to all of the lines whose terminals were on the west side of the river. I did not ask him, but what is the fact with respect to the New York Central delivery of export freight or import freight? Do they handle it as well on the west side of the river as on the east side?

A. As far as I know, we are receiving trainloads of silk via the West Shore and getting very prompt delivery and export service. I think in general those cars that come down over the West Shore are delivered before the ones at St. John's Park, but that is a general impression.

By Examiner Trezise:

Q. Delivered in Hoboken?

A. Yes.

By Mr. Carmalt:

Q. The West Shore track is not very distant from the connection of the Hoboken Manufacturers?

A. Right across the way.

Q. That is to say, the Erie has the east side and the West Shore the west side of the right of way and they are contiguous there?

A. Well, I am not familiar with the lay of the tracks there.

Mr. Carmalt: I think that is all.

Cross-Examination.

By Mr. Pierce:

Q. Does the testing company perform some service for the consignee of this silk by way of testing or anything like that?

A. It generally does, yes.

Q. Does it not do in particular?

A. It does it upon the consignee's order.

Q. That is what I mean.

A. Not always. There is a great deal of silk handled in warehouses upon which the testing company makes no tests or does no weighing.

Q. Does the silk come consigned in the care of the testing company?

A. It is all order notify bill of lading. It is simply Hoboken Manufacturers' delivery.

Q. It does not say in care of the testing company?

A. No.

Q. Is it generally understood that it shall be delivered in this warehouse that your company maintains?

A. I think that it is the Hoboken Shore Railway practice that all silk that comes consigned to them, that comes

over their rails addressed "Hoboken Manufacturers" is delivered to our warehouse. I am not conscious that silk is handled at any other point.

Q. Is there not a general understanding in the silk trade that that delivery will be made?

A. I think that is true.

Q. When the silk was coming over to Manhattan Island, you took delivery at the pier there, did you not?

A. No, our company took delivery at our warehouse only.

Q. Did you not have to send to the piers to get the silk?

A. No, that is the consignee's business.

Q. The consignee took it and then brought it to you?

A. Yes—I should make this exception: That we did warehouse at that time for the railroad companies silk for which the bills had not arrived after the free time expired. We had, I think, with a number of the companies an agreement that we would receive for them, after the expiration of the free time, silk for which the bills had not arrived. Of course, in that case, the railroad delivered the silk to us.

Q. Of course, the consignee on reshipping—and we take the silk which was not warehoused but on which the bills had not arrived up to the time the free time had expired—on such silk as that which was delivered at the pier, the consignee, of course, had to truck it to your warehouse or his, wherever he was taking it, and if he wanted to reship it, had to truck it back?

A. The first part of your question is a little complex. I did not quite get.

Q. When the consignee took delivery at the pier, of course, he had to truck it to his warehouse or to yours?

A. Yes.

Q. And if he wanted to reship it, he had to truck it back?

A. These are all delivered to the express company.

MR. PIERCE: I think that is all.

EXAMINER TREZISE: Any further questions?

By MR. COLLINS:

Q. Mr. Douty, you said that you did some warehousing for other railroads when the silk was delivered at the piers during the forty-eight hours free time?

A. No, after the expiration of the forty-eight hours free time, a number of the railroads would send the silk to us to warehouse for them.

Q. Are you not functioning in that same capacity now, after the expiration of the forty-eight hours for the Hoboken road?

A. Yes.

Q. Just as you were in some cases for other ones?

A. Yes, just the same.

Q. And you are not accepting delivery in any sense for the consignee of this silk from the Hoboken road, are you?

A. No, not within the free time. We are functioning only for the Hoboken Shore Railroad.

Q. In other words, the Hoboken Manufacturers Railroad must put the stuff in a house some place and later make delivery to consignee; is that correct?

A. Yes.

Q. And it has this arrangement with you, not to deliver to the consignee necessarily on your own account, but simply for the account of the Hoboken Railroad Company?

A. We can only deliver to the consignee on the order of the Hoboken Shore Railroad.

MR. COLLINS: That is all.

EXAMINER TREZISE: Are there any further questions?

By MR. CARMALT:

Q. I just want to ask Mr. Douty one question: Mr. Pierce asked you whether the testing company did not make tests on this silk for the consignee at the warehouse, and

your answer was yes. Do they ever give that service during the time the liability of the Hoboken Manufacturers Railroad exists?

A. No. No tests are made until after the silk has been delivered by the Hoboken Shore Railroad to the consignee, because we could not accept any orders except from the Hoboken Shore Railroad up to the time that they want us to release.

MR. CARMALT: That is all.

EXAMINER TREZISE: If there are no further questions, the witness may be excused. Call your next witness.

(Witness excused.)

EVERARD C. BROWN, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. CARMALT:

Q. Will you give your name to the reporter?

A. Everard C. Brown.

Q. Mr. Brown, will you state for the record your connection with the United States Testing Company.

A. Among my various duties, I am in immediate charge of the warehouse department, the shipping department, the billing department.

Q. Have you other duties in connection with it?

A. I have other duties; yes, sir.

Q. In other words, you are in charge of the entire plant of the day-to-day operation of the plant in Hoboken?

A. Not exactly. There is a testing department and a machine shop department over which I have no jurisdiction.

Q. But you have charge——

A. Of all the incoming and outgoing silk and the bookkeeping.

Q. And the warehousing?

A. Yes, sir.

Q. In that capacity, Major O'Neal says that he arranged with the testing company to perform the service of unloading, furnishing the storage during the free time and the delivery to the consignee with the testing company at cost.

A. That is right.

Q. You have had charge of the accounts that have been worked out under that arrangement?

A. I have.

Q. And of the service?

A. Yes.

Q. Will you state whether the silk that comes into the warehouse maintains its identity during the forty-eight hours and is or is not mingled with the other silk that may be in the warehouse.

A. It does retain its individual identity. It has not been mingled with the other. The silk that comes in for the consignees during the forty-eight-hour free period or subsequent to that time, if the papers have not been delivered upon order of the Hoboken Shore Railroad, they are stored for the account of the Hoboken Shore Railroad and there they are not mingled with the goods.

Q. Where delivery is taken by the consignee, what service does the testing company perform? Do you keep the billing record and accept the bill of lading and otherwise take the receipt of the consignee?

A. Yes, sir.

Q. And you keep the record of the delivery to the consignee, whether that be given in the warehouse or to trucks going direct to the warehouse?

A. Yes, sir.

Q. And you do that in connection with and as agent for the Hoboken Manufacturers Railway?

A. Yes, sir.

Q. What proportion of the raw silk that comes to New York is handled through your terminal there.

A. At the present time, something over 30 per cent.

Q. Something over 30 per cent. of the entire movement to New York?

A. Yes, sir; I mean 30 per cent. of the total imports of the Port of New York are now being received in Hoboken. We have only been receiving silk in Hoboken since the fifteenth of August.

Q. And you are still improving your efficiency over there, I suppose?

A. Yes.

Q. Is it your hope and your expectation to build up that service until a larger percentage comes to the company?

A. We expect to have it increased, yes.

Q. Of course, as the greater amount comes to you, the more simple becomes the trunk line railroad service; is that true?

A. Certainly.

Q. In connection with your arrangement made with the Hoboken Manufacturers Railroad Company, have you prepared statements by periods of the costs that you have incurred in doing this work?

A. I have.

Q. Have you those in the form of an exhibit?

A. I have.

MR. CARMALT: I would like to offer them——

By MR. PIERCE:

Q. Are they costs which have been paid you by the complainant in this case?

A. They are the costs that we have billed the complainant, but they have not been paid.

MR. PIERCE: Then I object to it.

By EXAMINER TREZISE:

Q. Those are your costs?

A. Those are the costs; yes, sir. There are copies here, if anybody wishes them.

EXAMINER TREZISE: I think we will receive them.

MR. PIERCE: I will take an exception to that, if I may, your Honor, as this is not an item of expense that the complainant has borne.

EXAMINER TREZISE: That was the explanation.

MR. PIERCE: I do not see that they are material.

EXAMINER TREZISE: We will find out how material this is in a moment.

(The statements were thereupon received in evidence, marked "Complainant's Exhibit 3, Witness Brown," and are forwarded herewith.)

By MR. CARMALT:

Q. Mr. Brown, you have here a paper, consisting of five pages, which, as I understand it, includes the letter with which you submitted the first invoice and a statement for each succeeding period showing the total cost to the United States Testing Company of the service which it performed for the Hoboken Manufacturers Railroad in the receipt, unloading, storage for the free period, and delivery to the consignee?

A. Yes, sir.

Q. You stated that your bills for this service had not yet been paid by the Hoboken Manufacturers Railroad Company.

A. Yes, sir.

Q. You conceive them to be an obligation of the Hoboken Manufacturers Railroad Company to the United States Testing Company under the arrangement between the two?

A. Oh, yes.

Q. And the fact that it has not yet been paid is no waiver on your part in any way of the claim that you have against the Hoboken Manufacturers Railroad Company for the service you have performed for it as its agent?

A. No, sir; that is not unusual for them not to be paid within that time.

By Mr. Collins:

Q. As a matter of fact, you expect to collect it, don't you?

A. We certainly do.

By Mr. Carmalt:

Q. Will you state how you have arrived at these costs, and what elements of costs have entered into it? Take that up for the first period, from August 14 to September 22.

A. That was the first period and we had to have some experience, although from August 14 to September 22 we had received 7460 bales. I computed the average weight of those bales as 133 pounds. What we call the Japanese bale is supposed to weigh 133 1/3 pounds, but there a considerable quantity of bales, known as campon bales, that are much smaller in size, which weigh around 114 to 116, and it was impossible to determine the exact number of campon bales, as distinguished from Japanese bales. For the first accounting I took an average basis of 133 pounds for all bales.

Q. Are there any bales that are heavier than 133 pounds.

A. Yes, some of them run heavier. What is known as a China bale which comes from Shanghai, they will weigh more. But those are few as compared with Japanese bales. I have computed the total time of unloading as taken, the actual time after breaking the seals and the men getting into the cars and getting the silk into the warehouse and onto the floors, and in computing the time of the men unloading, I did not compute any additional time that the men

might have of clearing it away—some of it could not be cleared away until it got into the warehouse, but they were constantly clearing it and piling it. The last bales that came into the house or off the cars were not cleared away, so I am merely taking the time after the men got out of the cars and that was the period for which we billed. The number of men was kept accurately by my checker. The rate of pay is a fixed rate of pay that we have for our men. The analysis here, the cost to unload, shows exactly what it costs to unload cars, that is, the physical effort of taking the silk out of the cars into the warehouse, and our checker who has checked those bales by marking a number with the checker of the Hoboken Shore Railroad.

By Mr. Collins:

Q. Do I understand that you had a checker there and the railroad company also has a checker there?

A. That is right. I computed the cost for unloading for the forty-eight hours. The ordinary charge for a bale of silk in any warehouse is twenty-five cents a month or fraction thereof. In this case I did not bill them twenty-five cents for storing that silk for forty-eight hours. I billed them merely for the two days at the rate of twenty-five cents, which makes it one and six-tenths cents per bale for forty-eight hours. Ordinarily, we charge twenty-five cents for that bale.

By Mr. Carmalt:

Q. That brought you to a total labor and space cost of $518.38 for the 7460 bales?

A. Yes, sir.

Q. Then you added to that 15 per cent. overhead?

A. Yes, sir.

Q. Up to that time you had included nothing for any time in clearing after it was taken into the warehouse. Have you included anything for supervision?

A. No, sir.

Q. Have you included anything for the clerical service done for the railroad of receipting for the traffic intended for the delivery, the records of them?

A. Only as to the clerical service in connection with the delivery within the free period. We charged them two cents a bale for making delivery.

Q. Yes, but did that include, that two cents per bale—how much cost does that include of the clerical service?

A. The labor and the clerical service of checking and delivering the bales to trucks of the consignee when the bills of lading have been presented within the free period.

Q. Would you say that that was cost, or how did you arrive at the two cents per bale?

A. It was an arbitrary charge that I fixed. The ordinary price of warehousing was 12½ cents for that service.

Q. The ordinary charge that you would make to a consignee?

A. Would be 12½ cents.

Q. For that service would be 12½ cents?

A. Yes, sir.

Q. To the railroad you have made it two cents?

A. Yes, sir.

By Mr. Collins:

Q. That is, for delivering the stuff to the consignee?

A. Yes, sir.

By Mr. Carmalt:

Q. The 15 per cent. overhead includes what item?

A. The wear and tear on the truck, supervision, likewise to some extent that wonderful protective service we have installed here to protect the stuff.

Q. You have a fire sprinkler system and protected warehouse?

A. Yes, sir.

Q. So that you arrive at a total cost per hundred pounds in the last block that you have termed "analysis," brings you down to a total cost per hundred pounds and a total

cost per bale. Those computations made from the weight of the bales computed as 133 pounds each divided into your total as shown?

A. Yes, sir.

Q. Is the same thing done to the succeeding pages?

A. The same thing was for the periods from September 22 to October 30.

Q. The second page shows, my copy here, September 22 to 30.

A. That is right.

Q. That is just for those eight days?

A. That is for those eight days in which we received 4247 bales.

Q. As to them, you arrived at a total cost per hundred pounds of 5.3 cents?

A. Yes, sir.

Q. And in the period from October 1 to October 14, the same basis of computation was used, the same elements included?

A. Exactly.

Q. And you arrived there at a total cost of 5.28 cents?

A. Yes, sir.

Q. And for the period from October 18 to 30, you arrived at a total cost of 5.4 cents?

A. Substantially, yes, sir.

Q. In each case you have taken the actual time that it took to unload the car and put the freight inside of the warehouse door?

A. Yes, sir.

Q. And you have included no more of the items in the subsequent periods than you did in your recounting of the first?

A. All on exactly the same basis.

Q. To your mind, does that statement represent the cost to you of doing this service?

A. I didn't catch the first part.

Q. Do these statements represent actually to you of doing this service?

A. They represent, I think, less than the cost to us. It costs us more than that.

Q. In other words, you think that the 15 per cent. that you have added for overhead is not inclusive of the items that you have left out in the actual computation?

A. No, sir, because frequently there is overtime, which has not been charged for, unloading at night.

Q. Mr. Brown, in connection with your statement regarding the liability of the Hoboken Manufacturers Railroad, Major O'Neal or nobody else, speaking for the Hoboken Manufacturers Railroad, has protested these bills in any way?

A. They just have not paid for them, like a whole lot of our slow customers.

Q. I have found that the Government is not always as prompt as some of the others in paying. Is there any further statement, Mr. Brown, that you think should be made here that would be pertinent to the issues that have been raised?

A. None that occurs to me.

By Mr. Collins:

Q. I should like to ask about the delivery cost here of two cents. Has that been reduced by virtue of your experience or does that remain the same——

A. That remains the same throughout.

Q. That is a service, is it not, Mr. Brown, or an expense to which the Hoboken Road would be put if it were delivering this stuff to the consignee in its own warehouse down by Fifth Street, is it not?

A. Yes, sir.

Q. And you are performing that service for the Hoboken Road like you are performing all of that service?

A. Yes, sir.

Mr. Collins: That is all.

By Mr. Carmalt:

Q. There is no item of this expense that the Hoboken Manufacturers Railroad would not be put to if it made the delivery itself to the Fifth Street Station?

A. Not a thing.

By Mr. Collins:

Q. That is, you have done everything here as, in a sense, the agent of the Hoboken Manufacturers Railroad Company, and submitted your bill for your work; is that correct?

A. Yes, sir.

Mr. Collins: That is all.

Cross-Examination.

By Mr. Pierce:

Q. Just to shorten this up, Mr. Brown, I notice you show there a wage rate of eighty cents an hour for checkers and seventy-five cents an hour for the unloaders, I guess they are.

A. Yes, sir.

Q. Are these men especially qualified for this work? I ask you that because those rates are appreciably higher than the rates we pay for that particular service.

A. Yes, those men that we use in that work are our regular warehouse men whom we have had for years and are especially accustomed with silk and could readily detect any damage in these silks. They are very apt in noticing the particular marks and the numbers or if there happens to be a discrepancy, as occasionally occurs on a bale, the mark would be the same, but the numbers—the bales are numbered on the flat and on the end. Quite frequently it happens that the numbers do not correspond. Our men are quite expert in catching that.

Q. Do you pay these men by the hour, the day, or the week?

A. By the week.

Q. How many hours do they work a week?

A. Forty-four.

MR. PIERCE: That is all.

By MR. CARMALT:

Q. I wanted to ask you, Mr. Brown, in that connection, whether that rate of pay you feel is justified by the efficiency of the men over might be done by a lower class of labor.

A. Oh, yes, they are more than the ordinary laboring men.

Q. Does that reflect itself in the despatch with which they complete the work?

A. Yes, they are experienced.

MR. CARMALT: I think that is all.

EXAMINER TREZISE: If there is nothing further, you may be excused.

(Witness excused.)

EXAMINER TREZISE: Has the Hoboken Chamber of Commerce any testimony to introduce?

MR. HABBERSTAD: I want to introduce testimony from the Chamber relative to the Hoboken Manufacturers Railroad as a necessary factor in the city's industries.

EXAMINER TREZISE: Is this some testimony that you are going to give or is it merely a statement?

MR. HABBERSTAD: Just a statement to file with the Commission.

EXAMINER TREZISE: What is the nature of it?

MR. HABBERSTAD: Shall I read it?

EXAMINER TREZISE: Yes. Are you going to give this as your testimony on behalf of the Hoboken interests?

MR. HABBERSTAD: Y s.

C. C. HABBERSTAD was thereupon called as witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

THE WITNESS: The Hoboken Chamber of Commerce considers the Hoboken Manufacturers Railroad an essential factor in the commerce and industry of Hoboken. It is the only rail service maintaining direct connection with the piers of twelve ocean-going steamship lines, the factory terminal buildings which house several nationally-known industries, and the two largest warehouse developments in the city. This railroad occupies a strategic position along practically the entire waterfront of Hoboken and industries locating on this waterfront in the future will be dependent upon the continued operation of the Hoboken Manufacturers Railroad.

EXAMINER TREZISE: Any cross-examination?

MR. PIERCE: No, sir.

(Witness excused.)

EXAMINER TREZISE: I believe Mr. Toll was going to appear. He wanted to get away and Mr. Pierce kindly consented.

MR. PIERCE: Yes, sir, it is quite agreeable.

H. G. TOLL was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

EXAMINER TREZISE: You may proceed, Mr. Toll.

THE WITNESS: My name is H. G. Toll. I am agent of the Trans-Continental Freight Bureau and chairman of executive committee of Trans-Continental Pacific Coast Terminal lines. In this case I am appearing for the mem-

ber lines of the Trans-Continental Freight Bureau which are:

Atchison, Topeka & Santa Fe System,
Canadian National Railways,
Canadian Pacific Railway,
Chicago, Burlington & Quincy Railroad,
Chicago, Milwaukee & St. Paul Railway,
Chicago, Rock Island & Pacific Railway,
Colorado & Southern Railway,
Denver & Rio Grande Western Railroad,
Grand Trunk Pacific Railway,
Great Northern Railway,
Los Angeles & Salt Lake Railroad,
Minneapolis, St. Paul & Sault Ste. Marie Railway,
Missouri-Kansas-Texas Railroad,
Missouri Pacific Railroad,
Northern Pacific Railway,
Oregon Short Line Railroad,
Oregon-Washington Railroad & Navigation Company,
St. Louis-San Francisco Railway,
Southern Pacific Company (Atlantic System and Pacific System Lines),
Spokane, Portland & Seattle Railway,
Texas & Pacific Railway,
Union Pacific Railroad,
Western Pacific Railroad.

Mr. F. H. Gillette, assistant general freight agent of the Chicago & Northwestern Railroad, will also testify in behalf of the western roads some of which are included in the list I have named. I expected to testify after Mr. Gillette, but I have read his testimony through carefully and I subscribe thereto. I think that will shorten up my testimony to a considerable extent.

It is the position of the lines which I represent that the divisions allowed the Hoboken Manufacturers Railroad Company, whatever they may be, should be absorbed by the

lines operating east of Chicago, Peoria, St. Louis and other western and southern termini of the Central Freight Association lines at which the traffic is interchanged.

The divisions of joint transcontinental rates between trunk line territory on the one hand and points in Trans-Continental territory have, ever since joint rates were established, been made over the western gateways, *i. e.*, Chicago, Peoria, East St. Louis and Ohio River crossings.

The transcontinental carriers and other carriers in the western district have no knowledge of the subdivision of the proportions accruing east of Chicago, Peoria, East St. Louis, etc., nor have they been asked to interest themselves in these subdivisions—they have not been concerned with it. In the same way transcontinental carriers and carriers in the western district have not asked the lines east of such gateways to concern themselves as to the subdivisions west of such gateways; nor have they asked the lines east of these gateways to join them in absorbing the divisions which accrue out of these joint transcontinental rates to terminal or lateral lines on the Pacific Coast many of which are shown in Exhibit No. 2 filed by Mr. Gillette.

In reaching certain deliveries in San Francisco, including deliveries to the State wharves, the freight must be delivered by the State Belt Railway (owned and operated by the State of California, under the jurisdiction of the State Board of Harbor Commissioners). The charge made by the State Belt Railway for this service is assumed by the connecting carriers; their eastern connections are not asked to bear any share of this expense, nor would the western lines expect the eastern lines to do so if the charge of the State Belt Railway were materially increased.

By Mr. Carmalt:

Q. May I interrupt you to find out whether that service by the State Belt Railway in San Francisco is a delivering or a receiving service?

A. It is a receiving service on this eastbound silk and a delivering service on the export or westbound traffic.

On the other hand, the allowance to the Hoboken Manufacturers Railroad Company is now asumed by the lines east of Chicago, Peoria, St. Louis, etc., and if the Commission should find that the present allowance to that company is insufficient and should be increased, that in no way changes the principles mutually agreed to by the interested carriers and no part of the allowance to the Hoboken Manufacturers Railroad Company should be assessed against the lines operating west of Chicago, Peoria, etc.

Effective May 1, 1922, as a result of negotations extending over a considerable period of time the divisions east and west of Chicago, East St. Louis and other western junctions and Ohio River crossings on transcontinental traffic were changed. As a result of this change the eastern lines' division east of Chicago to New York, Philadelphia, Baltimore and Washington and points in between covering the large Atlantic Coast terminals was increased from 25 to 27½ per cent. of the through rate. Corresponding increases were made east of Peoria, St. Louis and the other interchange points. The divisions to the balance of trunk line territory were not changed. If the western lines are required to participate in the proportion allowed the Hoboken Manufacturers Railroad Company on a revenue basis it would mean that 72½ per cent. of the allowance to that line would have to be taken care of by the lines west of Chicago. Any saving to the line haul carriers by the use of the Hoboken Manufacturers Railroad Company f[illegible]ties for delivery accrues entirely to the eastern lines, so we would have this anomalous situation where all of the economies would accrue to the lines east of Chicago and the western lines would be paying 27½ per cent. of the allowance to the Hoboken Manufacturers Railroad Company.

The present rate on silk from Pacific Coast ports to New York is $9 per 100 pounds, of which the lines east of Chicago receive 27½ per cent., or $2.47½ per 100 pounds,

which is 175 per cent. of their first class rate of $1.42. The western lines receive 72½ per cent., or $6.52½ per 100 pounds, which is 128 per cent. of their first class rate of $5.10 per 100 pounds. The classification rating on raw silk, value exceeding $1 per pound, by ordinary freight train service, is 1½ times first class. This import silk, however, is handled in special trains approximating passenger train time.

If, in reaching a conclusion in this matter the Commission should be actuated by the needs of the complainant carrier as was the case in the New England Divisions Decision, then we respectfully submit that the eastern lines' earnings are and have been for a considerable period, greater than those of the western lines and come nearer to approximating the rate of return contemplated by Congress.

I wish to submit at this time two exhibits prepared at my request by Mr. L. E. Wettling, Manager of Statistical Bureau for Western Lines and compiled from the Annual Reports of railways to the Interstate Commerce Commission——

Showing Railway Revenues and Expenses. Class I Railways and Large Switching and Terminal Companies—United States—for eight months ending August 31, 1925, v. 1926, also Rate of Return eight months ending August 31, 1925, v. 1926.

(The statement was thereupon received in evidence, marked "Defendants' Exhibit No. 4, Witness Toll," and is forwarded herewith.)

Showing Property Investment, Net Railway Operating Income and Rate of Return. Class I Railroads—Western District—1925.

(The statement was thereupon received in evidence, marked "Defendants' Exhibit No. 5, Witness Toll," and is forwarded herewith.)

It will be noted that the rate of return for the central eastern region was 4.86 per cent. in 1925 and 5.24 per cent. in 1926, whereas the rate of return to the western district (as a whole) was 3.63 per cent. in 1925 and 4.28 per cent. in 1926.

The transcontinental lines believe that they are not properly involved in this proceeding and therefore respectfully request that the Commission confine any order it may issue to the proportions accruing east of Chicago, Peoria, St. Louis and related gateways at which transcontinental traffic is interchanged between the eastern and western lines.

EXAMINER TREZISE: Any questions.

MR. PIERCE: No questions.

By MR. CARMALT:

Q. Mr. Toll, you said that this question of the division between the transcontinental lines and the trunk lines were subject to discussion and finally reached by agreement on May 1, 1922.

A. Yes, sir.

Q. And the basis then changed?

A. Yes, sir.

Q. Can you state whether or not that was based on the terminal costs at the Atlantic seaboard, that increase to the eastern lines?

A. That was one reason for the granting of the increased division.

MR. CARMALT: That is all.

By MR. PIERCE:

Q. Did not that increase, for instance, apply to Pittsburgh?

A. No, sir. It was not paid at any point in trunk line territory except New York, Baltimore, Philadelphia, Washington and a narrow strip in between those points taking in the large Atlantic Coast terminals.

EXAMINER TREZISE: Are there any further questions? If not, you may be excused.

(Witness excused.)

(A short recess was taken at this point.)

MR. TOEL: Mr. Examiner, I would like to make a slight correction in some of my testimony, if I might:

Mr. Pierce asked me if there were any other changes in the divisions, an illustration, Pittsburgh. I had my mind on trunk line territory when I answered. There was a change in divisions east of Chicago to Pittsburgh from 15 to 16½ per cent. and from Chicago to Cincinnati territory from 12 to 13 per cent. There was no change in divisions to any point in trunk line territory outside of the territory that I have given, for instance, to Albany remained at 25 per cent., east of Chicago and the Bessemer group remained at 18 per cent. east of Chicago.

EXAMINER TREZISE: There are no questions on that?

MR. PIERCE: No.

EXAMINER TREZISE: Then the western lines may proceed.

S. H. GILLETTE, was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

THE WITNESS: My name is S. H. Gillette. I am Assistant General Freight Agent of the Chicago and North Western Railway Company. I have been continuously in the employ of that company for the past thirty-five years. I am at present and have been for a considerable period in charge of divisions as between the Chicago and North West-

ern Railway Company and its connections. In this case I am appearing not only in behalf of the Chicago and North Western Railway Company but by special request for the following western trunk lines:

Chicago, Burlington and Quincy Railroad Company,
Chicago, Milwaukee and St. Paul Railway (H. E. Byram, Mark W. Potter and Edward J. Brundage, Receivers),
Chicago, Rock Island and Pacific Railway Company,
Illinois Central Railroad Company.

My testimony therefore should be considered not only for the Chicago and North Western Railway Company, although that company can be used as a typical western trunk line in this proceeding, but should also be considered in connection with all carriers parties defendant as heretofore enumerated.

In this case the complainant, the Hoboken Manufacturers Railroad Company, seeks an increased division of the rates on raw silk and silk in various stages of manufacture in which that company participates. It would seem necessary, therefore, to first consider what the tariff situation is as between the Hoboken Manufacturers Railroad Company, the complainant on the one hand, and the carriers operating west of Chicago on the other hand. A study of the tariffs show that the Hoboken Manufacturers Railroad Company is a participating carrier in Agent Toll's Trans-Continental Import Tariff 30-N, I. C. C. 1163, which, as far as our records indicate, is applicable to this traffic. On other traffic from western trunk line territory to points on the Hoboken Manufacturers Railroad Company, New York rates are applied by the use of East-Bound Billing Books which provide for routes, rate bases and division bases that stations on the Hoboken Manufacturers Railroad Company are subject to. Particular reference is given to Erie Railroad Billing Book No. 26, I. C. C. A-6605, page 100, which provides for New York rate basis and New York

per cents, route Erie Railroad, New York City, thence Hoboken Manufacturers Railroad Company. The New York rates published in conjunction with the western lines on the one hand and the Erie Railroad as an illustration, on the other hand, are made applicable to deliveries on the Hoboken Manufacturers Railroad Company by virtue of Guide Books of the New York line haul carriers as illustrated by Erie Railroad I. C. C. A-6605, in which the New York basis of rates is made applicable to the stations on the Hoboken Manufacturers Railroad Company via New York City, and in the case of the Pennsylvania Lines via Jersey City as per Star Union Line Basing Book I. C. C. 13.

The western lines have no knowledge as to what basis of earnings under this application of the Eastern Lines Guide Books accrues to the Hoboken Manufacturers Railroad Company. We do not know whether the Hoboken Manufacturers Railroad Company receives from the proportion east of Chicago a percentage division, a flat arbitrary or a switching charge under the arrangements that are in effect as between the line haul roads serving New York or Jersey City and the Hoboken Manufacturers Railroad Company.

We are not consulted by any eastern line in such arrangements as they may have made from time and have no voice in any decision that may have been reached with regard to these divisions. Our only interest has been in the level of rates as between points west of Chicago on the one hand and New York on the other and the division of such rates as may be mutually agreed to east and west of our gateways with our immediate connections. Under the circumstances we should be dismissed as parties defendant in this proceeding and no order should be issued which will in any respect alter the earnings now accruing west of Chicago. In proof of this statement we desire to call to the Commission's attention the fact that the situation pertaining to New York as between the Hoboken Manufacturers Railroad Company on the one hand and the Erie

Railroad and other lines east of Chicago on the other, differs in no respect whatsoever from situations existing west of Chicago as between line haul carriers and short haul or terminal lines.

When the western lines make division arrangements east and west of Chicago with their immediate connections, they expect to assume all obligations from their proportion that may arise in applying this joint through rate with terminal or short haul lines in the territory west of Chicago. They do not expect that if a group rate basis is extended beyond rails of the western trunk line carriers, that the eastern lines proportion must be reduced in order to assist in paying adequate revenues to such terminal or short haul lines. As a matter of fact, the eastern lines do and always have declined to participate in any allowances to short lines west of Chicago all of which comes out of the revenue allocated to the lines west of Chicago.

Therefore, where the terminal or short haul lines are located in eastern territory and there is a dispute over division as in this case, we maintain that this dispute must under the general scheme of our divisional arrangements, be confined to the proportion accruing out of such joint through rates east of Chicago. In substantiation of this statement that the western lines take care of such disabilities or extended application of rates, I desire to introduce Exhibit No. 6.

(The statement was thereupon received in evidence, marked "Defendants' Exhibit No. 6, Witness Gillette," and is forwarded herewith.)

My Exhibit No. 6 is a statement showing various short or terminal lines connecting with the Chicago and North Western Railroad Company. It is typical of the general situation west of Chicago and in many instances the roads here shown connect with trunk lines other than the Chicago and North Western Railway Company and the same divisional basis applies as shown in this exhibit. I have

shown the name of the road, its mileage and minimum earnings.

In connection with joint through rates from New York, the terminal line receives the percentage shown in the right hand column of the proportion applying west of Chicago and the lines east of Chicago do not participate in these allowances. The line haul carriers east and west of Chicago determine the divisions east and west, and then by independent negotiation the subdivision of the factor applying west of Chicago is divided in accordance with the per cents shown in this exhibit. We believe that this subdivision of the proportion west of Chicago is a matter solely of concern or interest to the lines west of Chicago and that the eastern lines should not be consulted with reference to this subdivision and that they have no interest therein since they do not participate in any allowance to these lines. This being true, we can see no reason why the proportion west of Chicago should be changed as a result of this petition because the western lines have no direct dealings with the Hoboken Manufacturers Railroad Company, have no connection with that line and have no interest or voice whatsoever in how the proportion east of Chicago may be subdivided through negotiations of the roads east of Chicago, hence this complaint, insofar as the carriers west of Chicago are concerned, should be dismissed. The western carriers are not even in a position to know whether the Erie or other eastern lines have been justified in extending the application of the New York rate basis to deliveries on the Hoboken Manufacturers Railroad Company and have no interest in whether that rate basis should apply to such deliveries or otherwise.

We believe that any application of the New York rate by the line haul carriers beyond their own deliveries should be a matter of subdivision of the proportion applying east of Chicago. If this view is not taken in such cases as here presented the result will seriously impair the facility with which rate adjustments have heretofore been handled. It

will mean that the western lines will have to give serious consideration to new terminal arrangements in connection wih joint through rates which the eastern lines see fit to make in their own territory and it will also mean that the eastern lines will have to give similar consideration to any arrangements the western lines may see fit to make with terminal or short haul lines in western territory. The result of this would be participation in rate adjustments of roads in territories with which they are not familiar and must necessarily slow up the adjustment of rates. No difficulties of this nature can exist where the proportion east of Chicago is subdivided by the eastern carriers with their short or terminal line connections and where the proportion west of Chicago is subdivided by the lines running west of Chicago with their terminal or short haul connections. Any other method of handling this question necessarily involves bringing a railroad into an arrangement in a territory with which it is not familiar and therefore complicate the situation which is a simple one if confined to a divisional break east and west of Chicago.

As further illustrating what I have in mind, I would like to introduce at this time Exhibit N. 7.

(The statement was thereupon received in evidence, marked "Defendants' Exhibit No. 7, Witness Gillette," and is forwarded herewith.)

THE WITNESS: (Continuing.) Exhibit No. 7 is a list of some of the principal short lines in Pacific Coast territory. The New York group rates are applied from points on these railroads to points on the Hoboken Manufacturers Railroad Company by independent action of the lines east of Chicago. The transcontinental rates from these points to points on the Hoboken Manufacturers Railroad Company first divides on per cents applying east and west of Chicago. The remainder accruing west of Chicago is first subdivided east and west of the Missouri River or Minnesota Transfer. then the remainder accruing west of the

Missouri River and Minnesota Transfer is subdivided with the short lines shown in this exhibit on all traffic originating on or destined to points on those lines. The western trunk lines are not concerned in the subdivision of the proportion accruing east of Chicago as between the eastern lines and the Hoboken Manufacturers Railroad Company, nor are they interested in or concerned with the subdivision accruing west of the Missouri River or Minnesota Transfer as between the transcontinental lines and the carriers shown in this exhibit. In fact, the western trunk lines do not even know what divisions exist between the eastern lines and the Hoboken Manufacturers Railroad Company or what the divisional basis is of the lines west of the Missouri River or Minnesota Transfer with the carriers shown in this exhibit. If these short lines should demand increased divisions of joint through rates in which we participate, our position in that event would be exactly as it is in this case, namely, that whatever their allowance may be it should come out of the proportion accruing west of the Missouri River or Minnesota Transfer, and this principal is so recognized today by the transcontinental lines. That we are justified in this not only substantiated by the theory on which these division arrangements have been made but our actual practice in dealing with terminal and short haul lines in our own territory. Since Federal control we have readjusted and increased the divisions of a great many of our short lines, and I understand the same is true with the transcontinental lines and their connections, but in no case have we called on the lines east of Chicago to participate in the original divisional basis nor in the advances made. In the division structures as exist today between the lines east of Chicago and the lines west of Chicago on transcontinental traffic, the transcontinental lines do not recognize or participate in any deduction before prorating in connection with terminal expenses or absorptions in the New York district. Neither do the lines east of Chicago recognize or participate in any deduction before

prorating in connection with the terminal expenses or absorptions in Pacific Coast terminals.

Therefore, if in this case the Commission should decide to accord the Hoboken Manufacturers Railroad Company an increase in their present allowance and the Commission does not allocate such increase to the lines east of Chicago it will mean that the lines west of Chicago out of their division of these transcontinental rates will not only absorb 72½ per cent. of whatever increase if any may be allowed by the Commission, but will carry with it the absorption on the part of the lines west of Chicago 72½ per cent. of the present allowance to the Hoboken Manufacturers Railroad Company, no part of which the lines west of Chicago have ever assumed heretofore.

Stated in another way, it might mean by increasing the division to the Hoboken Manufacturers Railroad Company and requiring that the division to that company should be prorated among all the lines participating in the traffic, the result would be the lines east of Chicago to their junction with the Hoboken Manufacturers Railroad Company would earn more money than under the present conditions. As an illustration, the lines east of Chicago to their connection with the Hoboken Manufacturers Railroad Company absorb out of their revenue 5¼ cents per 100 pounds which is allowed that company. If the lines west of Chicago are not released from any order which the Commission might make and the Commission decided we will assume, to accord the Hoboken Manufacturers Railroad Company 10 cents per 100 pounds in lieu of 5¼ cents which would be an increase of approximately 90½ per cent., then the lines west of Chicago would absorb 7¼ cents out of the 10 cents if allowed to the Hoboken Manufacturers Railroad Company, and result in according the lines east of Chicago 2½ cents more than they receive under the division basis as it stands today. In other words, today the lines east of Chicago absorb the 5¼ cents allowed the Hoboken Manufacturers Railroad Company and if the lines west of Chicago become involved

in this allowance the lines east of Chicago to their junction point with the Hoboken Manufacturers Railroad Company would absorb only 2¾ cents, while today they absorb 5¼ cents. Again assuming that the Commission awarded the Hoboken Manufacturers Railroad Company 20 cents which would be an increase of approximately 281 per cent. of 14¾ cents per 100 pounds, then the lines west of Chicago would assume 14½ cents out of the 20 cents and the lines east of Chicago to their junction with the Hoboken Manufacturers Railroad Company 5½ cents or only ¼ of a cent more than they assume out of their own revenue today.

It seems unfortunate that we have been made defendants in this case. We do not believe that we are properly involved, and therefore respectfully request that the Commission confine any order it may issue to the proportion accruing east of Chicago, Peoria, St. Louis and related gateways at which traffic is interchanged between the eastern and western carriers.

EXAMINER TREZISE: Are there any questions?

By MR. CARMALT:

Q. Mr. Gillette, is your presence here in this case at all affected by the decision of the Commission in the complaint by the Erie Railroad some years ago against the transcontinental lines asking for a larger division on account of a special terminal service they gave on transcontinental fruit?

A. No, sir; that case was given no consideration in connection with my appearance here.

MR. CARMALT: That is all.

EXAMINER TREZISE: Any further questions?

MR. PIERCE: No, sir.

(Witness excused.)

WILLIAM L. BURT was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. PIERCE:

Q. Mr. Burt, will you give your name to the reporter?

A. William L. Burt.

Q. Will you state by what railroad company you are employed, where, and in what capacity?

A. By the Pennsylvania Railroad at Jersey City, as assistant train master.

Q. Have you investigated the services which the Jay Street Terminal—and that is a Brooklyn terminal, is it not?

A. Yes.

Q. —the services which the Jay Street Terminal performed for the carriers in connection with the handling traffic to and from points on that terminal line?

A. I have.

Q. Please state the facts with respect to that.

A. In regard to the Pennsylvania Railroad, all cars are handled to the Jay Street Terminal at our Harsimus Cove yard float bridges, Jersey City; that is for all eastbound cars, and the Jay Street Terminal in turn delivered to the Pennsylvania Railroad at the same float bridges all westbound cars for movement over the lines of the Pennsylvania Railroad.

The distance from Harsimus Cove float bridges to the Jay Street Terminal is approximately three miles and the Jay Street Terminal furnishes all of the floating operations to and from the Pennsylvania Railroad float bridges at Harsimus Cove.

In addition to the floating operation, the following services are performed by the Jay Street Terminal: First, the Jay Street Terminal receive, transport and deliver freight except such as may require extraordinary facilities or such as may be classed as prohibited without unreasonable delay; second, Jay Street Terminal gives to the Penn-

sylvania Railroad at least one hour's advance notice by telephone of probable arrival of floats, Jay Street Terminal to bridge, and on bridge there float except at such times as when the Pennsylvania Railroad is unable to handle them promptly upon arrival when such service will be performed by the Pennsylvania Railroad; third, the Jay Street Terminal, to indemnify and save harmless the Pennsylvania Railroad for loss, damage or delay for which it may be responsible.

Q. That is, by "it" you mean the Pennsylvania?

A. Jay Street. Of course, the Jay Street Terminal to provide for inspection and condition of cars on arrival at and departure from their terminal.

Fifth, Jay Street Terminal to make reports to the Pennsylvania Railroad in such manner and form as the Pennsylvania direct, of refused, unclaimed, damaged, over and short freight, which freight shall be disposed of in manner indicated in agreement or required by the Pennsylvania Railroad.

Sixth, the Jay Street Terminal to provide and keep at its own expense on its own premises a competent and satisfactory person or persons to superintend the business, issue bills of lading and so forth.

Seventh, Jay Street Terminal to be responsible for and collect and pay to the Pennsylvania Railroad all charges due on outbound freight.

Eighth, Jay Street Terminal to insure against loss or damage by fire and marine risks all freight cars or property handled by it under contract with the Pennsylvania Railroad.

By Mr. Carmalt:

Q. Loss by fire and marine risks?

A. Yes. Ninth, cars handled by Jay Street Terminal to be subject to per diem, demurrage and track storage rules.

Tenth, Jay Street Terminal to keep requisite records, accounts, memoranda, to make required reports.

By Mr. Pierce:

Q. Mr. Burt, the evidence here is that this silk is delivered to the complainant, Hoboken Manufacturers' Railroad, by the Erie. I take it that silk which the Pennsylvania brings in for that delivery must by it be delivered to the Erie Railroad?

A. That is right.

Q. Will you please describe briefly the service which the Pennsylvania performs on such silk, commencing with its arrival in your line haul train.

A. After arrival, all cars of silk at our lower Jersey City yard are sent by special passenger shifter to the interchange tracks with the Erie Railroad at Marion, which is distant about one mile.

Q. Is that a congested territory at all, that one mile?

A. The most congested territory on the Pennsylvania Railroad. It averages a train movement every ninety seconds.

Q. The Erie will not accept this silk from you at all hours or on all days, will it?

A. They have notified us that they will accept shipments of silk for delivery to the Hoboken Manufacturers' Railroad only between the hours of 7 A. M. and 5 P. M. and not any on Sundays or holidays.

Q. Have you in mind any instances where carloads of this silk have been delivered in your terminal by reason of this restriction?

A. No, not in our terminal. We had a case Saturday, this last Saturday, where a car was delivered to the Erie Railroad and they considered it too late to effect delivery to the Hoboken Shore Railroad on Saturday and notified us that they would return to us at Marion, but with a neighborly talk they afterwards consented to accept it.

Q. The Pennsylvania has other traffic going to the Hoboken Manufacturers' Railroad, other freight traffic?

A. Yes.

Q. Is that delivered to the Erie?

A. It is not.

Q. Delivered to the float bridges?

A. Delivered to the float bridges.

Q. Do you deliver cars of silk to the Erie in lots of more than one?

A. We do.

Q. You deliver in whatever lots they come in?

A. In whatever lots they arrive at Jersey City.

MR. PIERCE: I think that is all.

CROSS-EXAMINATION.

By MR. CARMALT:

Q. Mr. Burt, your purpose in describing the service given by the Jay Street Terminal was to draw a picture of the physical comparison between that property and the delivery to the Hoboken Manufacturers' Railroad?

A. Yes, sir.

Q. You are not informed as to what the Pennsylvania Railroad pays to the Jay Street Terminal?

A. Our Cortlandt Street representative will testify to that. I am not familiar with the rates.

Q. Does the Jay Street Terminal handle any silk?

A. They have not handled any silk so far, so their representative informed me, but they would handle it if it were delivered to them.

Q. How is the traffic handled at the Jay Street Terminal?

A. Car floats.

Q. It is almost entirely a car-float service?

A. For the Pennsylvania, it is entirely a car-float service.

Q. And the Pennsylvania pays to the Jay Street Terminal, I suppose, for the service it performs?

A. So much per hundred pounds.

Q. Does the Pennsylvania Railroad undertake to unload the traffic at the Jay Street Terminal?

A. No, sir.

Q. Did I understand you to say that the Jay Street Terminal paid per diem for the cars while they were in their possession?

A. Under the contract they do.

Q. And they in turn receive the demurrage, if any, for the delay in unloading on the Hoboken side?

A. I believe so.

MR. CARMALT: That is all.

By MR. COLLINS:

Q. Does the Jay Street Terminal do the unloading in deliveries of this kind?

A. At their terminal, yes.

Q. Is that paid for by the Pennsylvania?

A. That is all in the rate.

Q. That is all in the allowance?

A. That is all in the allowance. The allowance covers everything after the car is delivered to them at our float bridges.

By MR. CARMALT:

Q. Does the traffic that is delivered to the Jay Street Terminal, I understood you to say to me, was not unloaded by the rate.

A. You asked me if it was unloaded by the Pennsylvania and I said no.

Q. I want to get that right: It goes in carload quantities to the Jay Street Terminal?

A. Yes, to and from.

Q. If it is to be unloaded there, a shipper ordinarily undertakes to unload his carload freight, does he not?

A. From team tracks, it is the same as one of our freight stations.

Q. And the only freight that is unloaded into the Jay Street Terminal is that which goes into the warehouse?

A. Into the warehouse.

Q. Who pays for that?

A. That is all performed by the Jay Street.

Q. But in your allowance to the Jay Street Terminal, you do not cover anything for the handling into the warehouse?

A. If it is unloaded into the warehouse, that covers everything.

Q. I know it covers everything. It covers everything that you are obligated to do, but are you obligated to unload carload freight into the Jay Street Terminal?

A. No, we are not.

Q. Nor do you allow it to the Jay Street Terminal for doing it, do you?

A. That is covered by our rates. They do all the handling to and from the warehouse, to and from cars, at their terminal and that rate per hundred pounds covers that service.

Q. Covers the service into the warehouse?

A. Yes.

Q. Is there any other freight that the Pennsylvania handles into New York Harbor other than export freight in which they undertake to unload the traffic into the warehouse of the shipper?

A. If you will ask me a specific case, I will try to answer it, but that is a general case.

Q. I will ask you if there is any freight that is handled through your terminals other than export freight, carload freight, that you unload?

A. Not other than our own freight stations.

Q. Do you unload into your own freight stations freight that comes here in carload quantities?

A. We do under contract, yes.

Q. Under special contract?

A. Yes.

Q. Does that special contract cover all freight that goes to the Jay Street Terminal?

A. No. When I say under a special contract, I mean this: that we have unloading contractors at some of our larger stations, particularly our lighterage stations, who handle shipments under a certain rate per ton.

Q. That is on the lighterage freight that you undertake to load?

A. Yes.

Q. But this freight is handled by car float.

A. This freight is handled by car float by the Jay Street people, yes.

Q. Does the rate carry the unloading from the car?

A. It does.

Q. In the Jay Street Terminal?

A. It does.

Q. When you float freight to your New York piers on the Hudson River, does the railroad company undertake to unload it?

A. Yes, they unload it.

Q. Anything that is delivered within the lighterage limits, the railroad company undertakes within the rate to unload?

A. Yes, at our freight stations.

Q. The Jay Street Terminal is one of your freight stations, is it not?

A. It is practically one of our freight stations, but my answer does not apply to the Pennsylvania Railroad unloading at Jay Street. When I say "our freight stations" I mean Pennsylvania Railroad freight stations and not any of the private terminals.

Q. Do you unload all of the carload freight that comes to the New York district?

A. That is handled at the Pennsylvania Railroad stations, yes.

Q. What proportion of it is handled at stations?

A. Do you mean proportion as between lighterage and floating, or what?

Q. I mean what proportion of it is handled at any of your stations where the Pennsylvania undertakes to unload carload freight?

A. They unload carload freight in Manhattan Island at Piers 2, 27, 28 and 29, at Thirty-seventh Street, at 22 East River, at Wallabout, at North Fourth Street, Brooklyn, and 125th Street, Harlem River.

Q. And do they allow free time after the unloading at the stations?

A. That is a traffic matter. That can only be answered by our traffic department.

Q. You are in charge of the operations, you know when your obligation and as an operating officer ceases?

A. Our obligation as an operating department ceases when the float is delivered at the pier.

Q. And thereafter whose obligation is it?

A. It is an agent's matter.

Q. The agent at the pier?

A. Yes.

Q. But it still is an obligation of the carrier?

A. Of the carrier, certainly.

Q. You do not handle any silk to the Jersey City Terminal?

A. No.

Q. You do handle silk to your piers—what pier?

A. Pier 28, New York.

Q. When you handle that silk to Pier 28, you move it by car float?

A. We do.

Q. And when it arrives at the pier, it is unloaded by the Pennsylvania Railroad?

A. It is, yes.

Q. How did you happen to describe that service in comparison with the service of the Hoboken Railroad, rather than the Jay Street Terminal.

A. Because I was not asked.

MR. CARMALT: That is all.

MR. O'NEAL: May I ask a few questions?

EXAMINER TREZISE: Yes.

By MR. O'NEAL:

Q. To whom does the Jay Street Terminal belong?

A. I don't know as a matter of record. It is a private terminal. It might be owned by the Arbuckles. I don't know.

Q. It is a great big storage warehouse, is it not?

A. They have a considerable storage warehouse business there.

Q. And the railroad operations there are merely an adjunct of the larger operations of warehouses, don't you think?

A. I could not answer that question, because I am not in charge of Jay Street.

By MR. COLLINS:

Q. Do you know if it is a common carrier?

A. I could not answer that question.

By MR. O'NEAL:

Q. Do you know if it is dependent entirely upon the allowances made to it by the railroads for its existence?

A. Only a Jay Street man could answer that.

Q. Do you know if the unloading that may be performed by the Jay Street Terminal, whether that unloading service is charged to consignees or tenants of those buildings, or whether it is done entirely at the expense of the Jay Street Terminal without charging it to anybody?

A. You will have to get that from the Jay Street Terminal.

Q. Then, do you think the Jay Street Terminal is at all comparable to the Hoboken Manufacturers' Railroad?

A. I think so far as the railroad end of it goes, that they are a fair comparison.

Q. There is a whole lot of the railroad end that you don't seem to be able to answer, so how can you tell?

A. What is it that I am not able to answer from the railroad end?

Q. The last three questions I asked you.

A. I don't consider that the railroad end.

MR. O'NEAL: I do. That is all.

EXAMINER TREZISE: Any further questions? If not, you may step aside.

(Witness excused.)

MR. PIERCE: Mr. Examiner, of course, in preparing this case, we had to divide up the work. Now, I have a man here for the other lines, who is prepared to state the facts with respect to the other Brooklyn terminals. That would mean calling about three witnesses. I think these gentlemen know that the situation is substantially the same as to each one of them, and if we can agree to that I will not have to call these witnesses and we can go straight ahead with the Erie man who handled the silk from the time it is delivered to him, to the Erie, until we deliver it to the complainant in this case. I should like to make such an agreement in the interests of saving time.

MR. CARMALT: Representing the intervener, I am entirely satisfied with that, Mr. Pierce.

MR. COLLINS: What is your man going to testify to, concerning the other terminals, is that it?

MR. PIERCE: Yes.

MR. COLLINS: As this gentleman has done?

MR. PIERCE: That is right.

MR. COLLINS: What other terminals would there be concerning?

MR. PIERCE: Bush Dock and Bush Terminal, New York Dock and the Brooklyn Eastern District.

MR. COLLINS: That you ask for an agreement—or rather your suggestion is that we concede that your witnesses would testify similar to this witness here?

MR. PIERCE: That is it exactly.

MR. COLLINS: If put on the stand? Surely, that is agreeable.

MR. PIERCE: Then I will call Mr. C. D. Ward.

C. D. WARD was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. PIERCE:

Q. Mr. Ward, you are assistant to the regional vice-president of the Erie?

A. Yes, sir.

Q. Located at Jersey City?

A. Yes, sir.

Q. And have been there for a number of years?

A. Since 1920; in my present position, I mean.

Q. Mr. Ward, have you investigated the handling of silk by the Erie, both silk arriving on the Erie and silk delivered to the Erie by connecting lines?

A. I have.

Q. Starting from August 19, 1926, please state how many cars of silk up to November 9 the Erie delivered to the complainant here.

A. From August 19, 1926, to November 9, inclusive, the Erie Railroad delivered to the Hoboken Shore Railroad fifteen cars received from the D. L. & W.; twenty-two cars received from the West Shore; twenty cars received from the P. Railroad; two cars received from the Central Railroad of New Jersey; twenty-five cars received by the Erie Railroad; a total of eighty-four cars.

Q. Where did the D. L. & W. deliver you this silk?

A. They delivered some to us via Seventeenth Street, Jersey City, in error. They should have been delivered to us at Croxton.

Q. You mean Croxton is the regular interchange point?

A. Croxton is the regular interchange point.

Q. Where are cars from the Pennsylvania delivered to you?

A. We call the station West End. It is Marion on the Pennsylvania.

Q. And from the West Shore and the Jersey City Central?

A. At Weehawken.

Q. Please state the fact with respect to any police protection and special service that you furnish in handling this silk.

A. When a car is delivered to us at one of these interchange points, we immediately put on watchmen; as a general thing, about one watchman to a car.

Q. How long do you keep them on there?

A. Until the cars are signed for by the Hoboken Shore Railroad, and we obtain their signature.

Mr. Pierce: I notice that Mr. Ward uses this pet name of "Hoboken Shore." It is understood that he means Hoboken Manufacturers.

Q. How about your engine service or train movement?

A. That is all special movement. As soon as a car shows up, we try to get rid of it as quickly as possible, which means special service.

Q. That is, you hook the engine onto the car and run it over there without waiting to get any other freight?

A. Go with one or three or four cars—whatever there happens to be in the string.

Q. How is it with your other freight that is delivered to the Hoboken Manufacturers' Railroad?

A. That goes over in the regular train to Weehawken, forty and fifty cars in a string.

Q. From there it is switched?

A. Switched out and sent over.

Q. That is, you do not make any special movement with other freight? You take it when you have the accumulation up to the regular delivery time, is it, or do you have any regular delivery time for the freight?

A. Yes, we have what we call regular transfer runs, but they are so scheduled that as a rule they get full trains.

Q. The Hoboken Shore will receive this silk at what time only, or, to put it in another way, what restrictions are there on the receipt of this silk?

A. They issued a notice to the effect that they are in a position to accept shipments of silk between the hours of 7 A. M. and 5 P. M., except on Sundays and holidays. I might say that Saturday the Pennsylvania gave us a car and we had it this morning. We had to carry it over Sunday and provide protection for it. The Hoboken Shore would not accept it after one o'clock.

Q. That was on a Saturday, was it?

A. Yes, they gave it to us on Saturday.

Q. Do you police these cars of silk when they are moving over your line haul from Chicago east or whatever western junction you may receive it at?

A. As a rule, there are four patrolmen on the train.

Q. And you say one for each car after it gets here in the terminal when you are switching it over?

A. Yes, as a rule, but if we have three cars we would probably send two men.

Q. These cars are returned to you by the Hoboken Manufacturers' Railroad about what time? If you deliver one before four o'clock or before five o'clock, when do you get it back empty?

A. As a rule, the cars come back to us during the night.

Q. Where do these silk trains that move over the Erie lines come, that is, into what yard of the Jersey terminal?

A. Come into our Jersey City passenger yard.

Q. And then the silk that is to go to the Hoboken Manufacturers' is handled out?

A. It is set out and taken from this yard right around over the Weehawken branch to Hoboken.

Q. About how far is that?

A. Two miles.

Q. That is within your terminal district?

A. Yes, sir.

Q. Is that a congested district?

A. Very much.

Q. If you have any that comes over—where do you make silk deliveries on Manhattan Island.

A. Duane Street, 20 and 21 North River.

Q. If you have a car of silk on that train coming over to Duane Street, what do you do with it?

A. It would be switched out of Jersey City and put on a car float and floated over to New York.

Q. And then unloaded there?

A. Unloaded on the pier and delivered.

Q. My attention was called to the fact that I have been saying "Hoboken Manufacturers." It is understood that I meant Hoboken Manufacturers' Railroad, the complainant in this case.

EXAMINER TREZISE: I think that will be understood.

MR. PIERCE: You may cross-examine.

CROSS-EXAMINATION.

By MR. COLLINS:

Q. When you get through with this switching service promptly without holding over the car, as you have done since Saturday in the other case, about how long is the car of silk on your line before it gets to Hoboken?

A. I have not got the figures, but we make the run, from Croxton to Hoboken, if there is not too much interference, we get over there in an hour.

Q. About how far is it?

A. You can about possibly four miles, three and a half or four miles.

Q. Are all of the movements about that long on deliveries to you from these various roads you mentioned in order to get the silk to Hoboken?

A. The West Shore is not.

Q. How long is that?

A. Their track adjoins our tracks. At Weehawken, they simply set them over in our yard. We pick the car up and take it over.

Q. Just a few yards?

A. It would not be over three-quarters of a mile at the most from the upper end of our yard. It depends on where they set the car.

Q. Can you state what the Erie receives for its performance of this service?

A. Are you speaking of tariffs now?

Q. Yes.

A. No, I know nothing about the tariffs.

Q. Do you know what compensation the Erie gets for the performance of this switching service to Hoboken from the other roads?

A. I do not; no, sir.

Q. The Erie is not concerned with any unloading or any expense of that sort?

A. I understand that; yes, sir.

Q. I ask you if that is a fact?

A. Yes, sir.

Q. All it does is pushing the car from where it takes it down to the Hoboken Shore; is that correct?

A. Leaves it down on the interchange track of the Hoboken Shore.

By Examiner Trezise:

Q. It does just an interchange service?

A. That is all.

By Mr. O'Neal:

Q. The float service that you would perform in making the delivery on Manhattan Island, if you have only one car or two cars, you would make a special movement for the float, would you not?

A. We would, on account of the time restriction. Of course, it might happen that we would have something on the float before we got there, and we might hold them.

Q. But if you did not have it, you would make that special trip?

A. We would not hold the car at Jersey City; no, sir.

Q. It is too valuable a commodity to take any chances with?

A. Yes, sir.

Q. As to the special service in moving silk between Jersey City and the Hoboken Shore Road connection, you have just said that if was only one car, you would make a special movement for that. Is it not true that a special movement for one car costs a great deal more than the regular movement for a number of cars; that is, the per car cost?

A. That stands to reason; yes, sir.

Q. Because of the highly valuable commodity and the element of time and so forth that enter into this, it must be handled special?

A. It would take as much time for a crew with one car as it would with four or five. That is what costs the money.

Q. And then after returning to the float service, after making a delivery of, say, one or two cars by float from your Jersey City float station to New York, you have in addition to that the station service of unloading the car, handling, delivering, etc.?

A. We do not do the loading.

Q. You would perform the unloading?

A. We unload at the pier float; yes, sir.

Q. You actually perform that unloading and pay for that yourself?

A. Yes, sir.

Q. And in making the delivery, etc.?

A. Yes, sir.

By Mr. Collins:

Q. While this silk is being switched from your connections over to the Hoboken Manufacturers', do you provide any special insurance on it, as terminal insurance, or is it running yet under a part of the transcontinental insurance?

A. All I know is what I have heard, that the general insurance covers it. I don't know anything personally about it.

Q. That is, that the line haul insurance covers it?

A. Yes. I don't know anything about it personally.

By Mr. Carmalt:

Q. Mr. Ward, how is the Jersey City passenger yard located with respect to your car float bridge?

A. It is just the width of one dock over there, just the other side, a short distance north.

Q. It requires a movement from the passenger——

A. A back movement; yes, sir; then on to the float bridge.

Q. Is that service comparable with the service of moving from the passenger yard up to the Hoboken Manufacturers'?

A. No. In order to get to the Hoboken Manufacturers' Railroad you have got to run over a great deal more territory to get through that congested district.

Q. It is pretty congested down around the float bridge, is it not?

A. Well, not so bad right down around the float bridge as it is when you get a little further back around the mouth of that tunnel.

Q. What would be the difference to your mind of the running time only in moving from the Jersey City passenger yard to the float bridge and the time from the Jersey City

passenger yard to the connection with the Hoboken Manufacturers'?

A. Five to one, possibly six to one.

Q. In time?

A. Yes, sir.

Q. And that means how much in minutes?

A. I would allow an agent an hour to go from Jersey City over to Hoboken Manufacturers' Railroad.

Q. And ten minutes to go on to the float bridge?

A. Five to one, that would be twelve minutes.

Q. That is a lot, twelve minutes to bump on an engine and hook it on.

A. It all depends. This other means going way around the Weehawken branch.

Q. Are the floats under your supervision?

A. Yes—not direct under my supervision, but under my superior's supervision.

Q. How does a movement by float compare with a switch movement of the same length in the matter of cost of service; do you know that?

A. I do not know as to we have got anything of that kind we could compare. It certainly does not come in conflict with us anywhere where we have got a float movement and a similar movement by rail.

Q. You have got a distance here from the Jersey City passenger yard to your Duane Street pier which involves twelve minutes time with a switch engine and considerable time with a float. You don't know how much time?

A. A float ought to go across that river in twenty minutes, at the outside.

Q. Loaded and tied up at the far side in twenty minutes?

A. No, not tied up.

Q. You have got to tie it up before you unload it, do you not?

A. Of course, there is another thing that comes in to interfere. You might steal across the river——

Q. Let us get this point. We will get to the interference in a few minutes. What is the relative difference in the service between the service from the Jersey City yard to the Duane Street pier and the service up to the connection with the Hoboken Shore Railroad in time—let us take the time first?

A. I don't know, I never tried it.

Q. You figure it is not less than half an hour to get across and tie up the float at the pier; is that true?

A. I think a car float should go across there in an hour with one car on it.

Q. And it would take an hour to get it up on the Hoboken Shore?

A. I did not say an hour. I said it ought to go across in fifteen minutes—from the float bridge to Duane Street, I am talking about.

Q. That is what I am talking about.

A. Ferryboats go across there in five and sometimes under five.

Q. Under very exceptional movements?

A. Yes, if there is nothing in the way.

Q. From the time that you tie up at one pier on the Jersey side and push a car and then hook a tug on and pull it across the river and tie it up at the Duane Street pier, can that be done in twenty minutes?

A. No, sir.

Q. What equipment is necessary to pull it across there? You have to have a car float.

A. You have to have a car float and a tug.

Q. Do you have your own tugs or do you employ the tugs?

A. They belong to us under a lease, under a contract.

Q. You are leasing them under a contract and you operate them?

A. No, the contractor operates them.

Q. Is that on a time basis?

A. No, it is on a service basis.

Q. Each movement is paid so much?

A. On the distance, yes, sir.

Q. What do you pay for the use of the tug from the Jersey City float base to the Duane Street pier?

A. I don't know. I haven't got the figures with me.

Q. Is it comparable with the operation of an engine for a similar distance?

MR. PIERCE: He said he did not know what the cost was, so how can he compare it?

MR. CARMALT: He is in charge of this operation, or assistant to the vice-president. I think he ought to know something about it.

A. As I said before, we have never made any comparison between a movement by switch engine and a movement by a tug.

Q. They are not comparable, are they?

A. No, not at all. We have not anything of the kind nor any reason why we should take up anything of the kind.

Q. Don't you sometimes determine whether or not it is cheaper as an operating proposition to operate by a car float or by a switch movement?

A. Not very well in talking about crossing the North River.

Q. I am not talking about the North River.

A. That is the only move we have.

Q. Don't you have any other terminals?

A. We have only one float bridge.

Q. The other line has a float bridge.

A. We don't use them.

Q. You don't interchange any freight with a car float?

A. Not on the Jersey side of the river, no.

Q. You do not know what presentation has been made by the Erie and other railroads regarding the relative costs of the water terminal in New York with the terminals at other cities, do you?

A. No, I have seen all that stuff.

Q. But you have a general impression about it that it is being looked upon as being a little more expensive than any other delivery that you have on your railroad.

A. It is claimed so, yes.

Q. The Erie claims it, does it not?

A. I believe it costs more to business in New York than it does in any other place.

Q. About the service of this watchman, that is the same service that you have if you delivered on your own pier, is it not?

A. Yes, we would cover the car on our own pier just the same.

Q. And you would make a special movement with the engine to put it on the float and you would make a special movement with the float to move it over to Duane Street, would you not?

A. Yes, sir.

Q. You have a similar notice to that of the Hoboken Shore giver to your connections that you will not receive the silk from the Pennsylvania or from the Jersey Central or any other line except between the hours of 7 and 5?

A. We reissued that to our connections, as a matter of protection to ourselves.

Q. You keep your four patrolmen on the train when you are moving it on to the float bridge?

A. They ride all the way from Chicago. There is always a man on the car.

Q. Is he on the car going across the float?

A. They ride on the float, yes.

Q. Do you have special watchmen on the pier when you are handling it at Duane Street?

A. I don't think it is necessary. I think we have got watchmen enough there all the time.

Q. You always keep watchmen there?

A. We have to, yes.

Q. Do you carry a policy to insure it while it is on the Duane Street pier?

A. I understand there is; I don't know personally.

Q. That you don't know about?

A. No, sir.

Q. But whatever the requirement of the policy is with respect to police on the pier, you do it on the Erie pier?

A. That is what I said. I don't know what the policy requires.

MR. CARMALT: I think that is all.

(Witness excused.)

H. WILSON was thereupon called as a witness, and having been duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. PIERCE:

Q. Mr. Wilson, you are chairman of the auxiliary committee of the Trunk Line Association?

A. I am a member of that committee, and I am chairman of the general freight committee.

Q. You have had a number of years' experience in traffic work here in New York, have you, in this district?

A. Yes, sir.

MR. CARMALT: You do not need to qualify Mr. Wilson as an expert on traffic matters.

THE WITNESS: Thank you.

Q. You were the chairman of this traffic committee that was charged with the preparation of the data to be presented in this case?

A. I am.

Q. And you had access to the records of other railroad companies to get such data for any that you may have asked for?

A. I did.

Q. Did you investigate the facts which the committee decided should be presented here?

A. I investigated certain facts myself and I asked others to get certain information which was done and delegated to those to get certain other information which also has been done and testified to.

Q. The data which you are about to present was that which you collected yourself personally or else collected by the other lines, members of the committee, and reported back to you as chairman?

A. That is right.

Q. Mr. Wilson, will you state what the allowances are on transcontinental traffic for the Brooklyn Eastern District Terminal, for the Jay Street Terminal and for the Bush Docks?

A. On all traffic except cordwood, grain, ice, coal and coke, 6½ cents per 100 pounds; on cordwood, grain and ice 6 cents per hundred pounds. I don't think we need to put coal and coke into this record.

Q. The New York Dock Railway had a divisional case before the Commission, did it not?

A. Yes; No. 13010.

Q. What divisions were fixed by the Commission as a result of the hearing in that case?

A. The Commission fixed on carload traffic, fixed for the New York Dock Railway on carload traffic 8 cents, on less-than-carload traffic 11 cents per 100 pounds, and special divisions on coal and coke.

Q. Mr. Wilson, did you make any investigation to see whether or not there were several commodities which were received from or delivered by the complainant in this case in carloads?

A. I did.

Q. Just mention some of them, will you, without unduly encumbering the record.

A. I have a list of commodities: westbound, that is, commodities delivered to the trunk lines by the Hoboken

Manufacturers Railroad, probably fifty commodities on the list, maybe more; asbestos fibre, dry cell batteries, china ware, coffee, coke, plate glass, hides, meat, flint, pebbles——

Q. It is what might be called a general range of commodities?

A. It is what might be called a general range of commodities, and then in addition to the carloads, there was a very large list of l. c. l.

Q. On transcontinental traffic, do you receive from the Hoboken Manufacturers Railroad or deliver to them any commodities other than silk?

A. There are a few.

Q. Name some of them, will you, so as to give an idea of the range.

A. Westbound, there was received from the Hoboken Manufacturers Railroad, bronze, liquid bronze and powder, dry goods, copper, powdered metal goods, pencils, and a few other commodities. Eastbound, they had Oriental silk, pencil material, apples and lumber. That represents about all the eastbound commodities, in carloads. Substantially no interchange of l. c. l. commodities for transcontinental points, either eastbound or westbound.

Q. Mr. Wilson, will you please state the history of the allowances to or the division accorded to the Hoboken Manufacturers Railroad on the traffic handled by it?

A. The original allowance was October 1, 1897, and it was at that time on carload traffic unloaded or loaded by Hoboken Shore 40 cents a ton. That charge was increased on June 1, 1907, to 60 cents a ton, and increased on July 1, 1918, to 80 cents a ton and increased on August 26, 1920, ex parte 74, to $1.12 per ton where the through rates were increased 40 per cent. under ex parte 74, and $1.06½ per ton where the through rates were increased 33 1-3 per cent. under ex parte 74.

Carload traffic loaded or unloaded by shipper or consignee was, on October 1, 1897, 20 cents a ton, and was increased on July 1, 1918, to 25 cents a ton; was increased on

August 26, 1920, under ex parte 74, to 35 cents a ton where through rates were increased 40 per cent. under ex parte 74, and 43½ cents a ton where through rates were increased 33 1/3 per cent. under ex parte 74.

On l. c. l. traffic from or to steamship piers, Campbell's Stores and American Warehouse & Trading Company, the original allowance, on October 1, 1897, was 40 cents a ton; was increased on June 1, 1907, to 60 cents a ton; was increased on July 1, 1918, to 80 cents a ton; and was increased on August 26, 1920, under ex parte 74, to $1.12 a ton where through rates were increased 40 per cent. under ex parte 74, to $1.06½ where through rates were increased 33 1/3 per cent. under ex parte 74.

On other l. c. l. traffic, the original allowance was 2½ cents per hundredweight plus 20 cents per ton; and on July 1, 1918, this was increased to 87½ cents a ton; and on August 26, 1920, under ex parte 74, this was increased to $1.22½ a ton where through rates were increased 40 per cent. under ex parte 74, and $1.16½ where through rates were increased 33 1/3 per cent. under ex parte 74.

The present allowance of the Hoboken Manufacturers', which became effective July 1, 1922, is as follows: On carload traffic unloaded and loaded by railroad, $1.01 per ton where through rates were increased 40 per cent. under ex parte 74, and 96 cents per ton where through rates were increased 33 1/3 per cent. under ex parte 74.

On carload traffic handled on team tracks or private siding, 32 cents per ton where through rates were increased 40 per cent. under ex parte 74, and 30 cents per ton where through rates were increased 33 1/3 per cent. under ex parte 74.

On less than carload traffic, $1.11 per ton where through rates were increased 40 per cent. under ex parte 74, and $1.05 per ton where through rates were increased 33 1/3 per cent. under ex parte 74.

There were a few minor changes in those rates, which I did not read as they do not amount to anything.

Q. I notice that your figures show a distinction there between carload traffic loaded and unloaded by the complainant and that which is handled on team tracks or private siding. Are we to understand the effect of that to be that carload traffic on that line handled by team tracks or private siding is loaded or unloaded by the shipper?

A. That is right; that is the distinction.

Q. If a delivery were made at a private siding of a carload, then the shipper would unload it, is that it?

A. Yes.

Q. Now, what do the tariffs provide with respect to loading or unloading freight at pier stations in Manhattan?

A. They provide where the carrier loads or unloads freight, there would be no charge made for it; at the carrier stations or carrier's platforms, not at private stations or private warehouses or private switches or sidings.

Q. Did you make any investigation, Mr. Wilson, through your committee, to discover what, if any, claims the carriers paid [redacted] his silk?

A. I have the figures here of two of the carriers.

Q. They are very short, are they?

A. Yes, very short. For the year 1924 the Pennsylvania Railroad paid $1521.78 in claims.

By Mr. Collins:

Q. On silk?

A. On silk? It does not show what it is for, whether for loss or damage. That is the total payment.

In 1925 they paid $430.81.

In 1926 to October 31 they paid $55.23.

The New York Central kept no separate record of their silk claims from other claims in 1924 and 1925, but for 1926, up to October, they paid $93 on raw silk.

The Erie Railroad for three years, October, 1923, to September, 1926, inclusive, paid $89.38, none of which was due to robbery.

The D. L. & W. paid in 1924, for loss, $20.06; in 1925, for loss, $369.73; in 1926, for loss, nothing.

By MR. PIERCE:

Q. Mr. Wilson, did you obtain a copy of an insurance policy covering the transcontinental movement?

A. I did.

Q. Without cluttering up the record—of course, if it is desired, we will make a copy or copies of it and file it. The only thing that I wish to get in the record is the liability clause and I will ask you to read the liability clause and then if my friends on the other side want the whole thing put in we will make copies and file it with the Examiner's permission.

A. The liability clause, that is, the clause relative to the deliveries at Hoboken, reads as follows:

Q. This is raw silk?

A. Raw silk, imported raw silk, moving from the Pacific Coast by rail.

"In case of shipments to points of destination other than New York, this insurance shall terminate immediately upon discharge from railroad car at the point of destination. If the car is not discharged within forty-eight hours after its arrival the assured will notify the insurance company and pay additional premium thereon if required."

MR. PIERCE: Cross-examine.

CROSS-EXAMINATION.

By MR. CARMALT:

Q. Did your inquiry go into what the terminal lines paid for insurance when delivery is made on their pier after the expiration of the transcontinental insurance?

A. No, I did not go into that, because that did not seem to have anything to do with the case. I did not inquire into it.

Q. You knew that in the complaint they put one item of the cost to the Hoboken Manufacturers' Railroad of 11¼ cents for insurance during the forty-eight hours' free period time, did you not?

A. Yes.

Q. And Mr. Ward has testified that it is the practice of the Erie to carry insurance for that period when delivery is made on its pier, did you not know that that was done by all of the lines?

A. Yes, but I do not see the connection between the delivery on the Erie pier where the policy provisions are different than those at Hoboken. Under the insurance policy in existence covering the Hoboken deliveries, it seems to me there is no question but what the terminal line or the lines including the terminal line are insured up to forty-eight hours after the property gets there. That is all there is to it. You do not need any more insurance.

By Mr. Collins:

Q. Where is that, on the piers?

A. No, at Hoboken, on the Hoboken Shore Railroad.

By Mr. Carmalt:

Q. Can I look at that liability clause again?

A. I will show it to you in the policy. (Handing paper to counsel.) It is number six.

Q. I am quite frank to say that I do not read that policy as having the same intent. If the car is discharged, whether into a warehouse or to the shipper, the transcontinental insurance ends at the time the freight is taken out of the car.

A. So does the obligation of the Hoboken Shore Road at the time the freight is taken out of the car.

Q. Now, we are getting at your proposition. You do not think, then, that because this freight is delivered to the United States Testing Company, that the Hoboken Shore Railroad has any obligation beyond that time?

A. Absolutely none.

Q. If it delivered it to its own station, you would think that it had the obligation that was carried by its tariff?

A. That is a different matter.

Q. And its tariff carries an allowance to the shipper of forty-eight hours for free time?

A. To where?

Q. To take the freight away.

A. Away from where?

Q. From the terminal. Mr. Wilson, I think we understand each other now. You think there that there is no liability upon the Hoboken Shore Railroad after the car is unloaded at the United States Testing Company's plant?

A. I think that if the United States Testing Company elects either to buy or lease or establish its own warehouse for the receipt or delivery to the carrier of raw silk or anything else, that is its business. It has got a perfect right to do it. But having done it, it should be subject to the same rules and regulations that cover the same kind of industries in that territory.

The shipper or the receiver takes his freight at the door of his warehouse or the platform of his warehouse from the car, unloads himself and assumes all responsibility from that time on.

Q. That assumes, of course, that the United States Testing Company and the shipper are one and the same.

A. No, they may be different. It does not make any difference whether they are the same or not. The United States Testing Company is certainly the agent for the silk shipper or receiver who elects to put the freight in their warehouse.

Q. Not when the railroad has made it its agent for delivery.

A. We claim that the Hoboken Manufacturers' Railroad is under no obligation to make the testing company its agent and has no right to saddle the expense of that large-heartedness, if you can term it that, upon the trunk lines.

Q. Let us look upon it a little from the point of view of its——

MR. PIERCE: If I can interrupt you a moment, if you and Mr. Wilson are going to argue this law question——

MR. CARMALT: I just want to get at the facts.

MR. PIERCE: I want it understood that I am not bound by either one of your construction of what the law is. I may differ with both of you.

MR. CARMALT: Very good. I should hardly expect to agree with you on the law.

Q. Let us assume that the Hoboken Shore Railroad Company elected to take this freight into its Fifth Street station. You have no doubt, then, that under this insurance policy, that it would be obligated as a common carrier until it effected delivery within the period of free time allowed by the tariff?

A. The insurance policy has not got anything to do with it. It has insurance under that policy for a certain time. Whatever might happen after that——

Q. I am just referring to that as an incident even under that policy. It would have its obligation as a carrier until the tariff time had expired, within which delivery might be made?

A. Yes.

Q. Or until delivery to the shipper within that time?

A. Yes.

Q. If in its judgment it thought it more economical to effect these deliveries through an adequate station that happened to be located on its line, you have no doubt of its right to employ an agent to perform that station service for it, have you?

A. I think there might be a lot of doubt about it.

Q. Have you any doubt about the right of the trunk lines to employ the Jay Street Terminal and the New York Dock Company and the Bush Terminal as their agent?

A. They employed them as to all freight. They make deliveries of all freight in the same manner.

Q. But they might limit that to certain freight?

A. But they don't.

Q. They don't happen to. But you have no doubt of their right to employ an agent to make delivery for them.

A. They employ an agent, but that agent represents them as a common station for all kinds of freight. What is done here with this silk testing company warehouse is to make a freight station for silk and they do not have a freight station in somebody else's warehouses for some other kind of freight. I say there is no necessity at all except to save the testing warehouse the cost of unloading their freight and saving them some insurance for establishing a warehouse for the handling of raw silk in this warehouse at Hoboken. That is my position honestly stated.

Q. Mr. Wilson, as long as we understand one another fully on the law, may we get down to a little of the fact in this situation.

A. I am not sure that is the law. I am just trying to take the common sense view of it. I don't know anything about the law.

Q. Suppose we now take the facts in this case: That the Erie Railroad elects to make its terminal for the delivery of silk at Duane Street. It also elects to make joint rates with the Hoboken Shore Railroad for delivery of silk. I want to examine into the facts with respect to its delivery at its Duane Street pier——

MR. PIERCE: I think I should properly object to it. That is not proper cross-examination.

MR. CARMALT: I think Mr. Wilson has not failed to touch on every phase of this delivery service. I am trying to get at the facts, what causes the Erie to deliver freight on its Duane Street pier, what its obligations are in connection with that delivery.

MR. PIERCE: There is certainly nothing in Mr. Wilson's direct testimony to investigate into that.

EXAMINER TREZISE: It is a little aside from that, but you may proceed, however.

By Mr. Carmalt:

Q. What service is given in that connection? You have heard Mr. Ward's testimony and you agree with that, the service that is given by the Erie?

A. I will leave that to Mr. Ward; I don't know anything about it.

Q. You have not investigated that?

A. No.

Q. You have not investigated anything about what economies are effected to that trunk line or to any other by reason of the delivery to the Hoboken Manufacturers Railroad?

A. I judge from the testimony I have heard here, there is none, but I don't know anything about it aside from that.

Q. You have not considered that phase of the question at all?

A. Not at all.

Mr. Carmalt: That is all.

By Mr. Collins:

Q. Mr. Wilson, you say that the trunk lines allow 6½ cents per 100 pounds to the Bush Terminal and the Brooklyn Eastern Terminal and the Jay Street Terminal.

A. This is Bush Docks. It means the same thing, but just to get the record clear.

Q. That is all of the traffic and is not all silk?

A. It would be on silk, it applies on silk if they handle silk. I guess they don't get any there.

Q. No silk is delivered there.

A. I don't think so.

Q. By the way, I wonder if you have, or if you have, Mr. Pierce, the reference to this case that you spoke of, the New York Dock Railway.

A. I gave it to you. I have not got the page. Docket 13010, sub No. 1.

Q. In that case, you say, allowances were fixed of 8 cents per 100 pounds on carload traffic?

A. Yes, 8 cents a hundred pounds on carload traffic.

Q. How much on l. c. l.?

A. 11 cents.

Q. In which class does this silk traffic fall?

A. You mean as to carloads and l. c. l.?

Q. Yes.

A. The very large part of it is l. c. l. It is mixed carload.

Q. It is traffic under what is customarily called l. c. l.?

A. It is.

Q. And the allowance is what, $1.01 a ton at the Hoboken Shore?

A. $1.05.

Q. And that per hundred pounds is about——

A. 5¼ cents.

Q. You read off the loss and damage claims paid by the several lines, trunk lines, on silk. I suppose that that was due to the good police protection and other protection thrown around the silk?

A. I presume so.

Q. And it is just as essential for the Hoboken Shore to give that good protection as it is for the trunk lines in order to have this small loss and damage?

A. Protection on its railroad, yes, but not protection in the warehouse after they make delivery.

Q. There is no policing necessary for them around the silk in the warehouse, but that is assuming you have a good substantial warehouse?

A. There is a big insurance cost that is put in there as an item of expense in the warehouse.

Q. Of course, that would not prevent thieves and burglars.

MR. COLLINS: That is all.

By MR. CARMALT:

Q. You did not put in the allowance to the Bush Terminal. That case was never decided by the Commission, was it?

A. I don't think so. I think it was withdrawn.

Q. Did you agree with the Bush Terminal to pay them the same as the Jay Street?

A. No, the Bush Terminal Railroad allowance was a little bit different. I did not put those down here. I did not think it had anything to do with it.

Q. Why have they not the same to do with it as the Jay Street Terminal?

MR. PIERCE: I thought we excused a lot of witnesses because one man had testified as to the service the Brooklyn Terminal had performed and the service he performed on the raw silk which was delivered to the Erie for delivery to Hoboken Manufacturers and that all the other witnesses would have testified substantially in the same way with regard to the other terminals that I have named and with respect to their handling of silk.

MR. COLLINS: I did not understand that we were admitting the service was the same. We were simply agreeing that the witness would testify it was the same.

By MR. CARMALT:

Now, I would like to know what the division of the Bush Terminal is.

A. I read them. The divisions of the Bush Terminal and the Jay Street Terminal are all the same, 6½ cents for all traffic except cordwood, grain, and a few others.

By MR. O'NEAL:

Q. In the allowance of 8 cents on carload traffic to the New York Dock Company, does that include an allowance to them for unloading freight?

A. It includes an allowance for them for unloading freight in their warehouse, for such freight as they are obligated to unload. It does not include any allowance to them for unloading freight in private warehouses.

Q. Do you know that in addition to the allowance that they get from the trunk lines, say, of 8 cents per hundred pounds on carload traffic, that when they unload freight and deliver to their tenants and consignees, that they make a charge in addition to that? That, in addition to this 8 cents per hundred pounds that they are getting from the trunk line, they are also getting a further charge from the consignee?

A. I don't know. There are two operations over there. One is the New York Dock Railway, which operates the stations. They have got three stations in Brooklyn. They perform a service between those stations and the rail termini of the trunk lines on the Jersey shore and the New York Central's Sixtieth Street. Then there is the Bush Dock Company, I think that is the name of it, which operates some other services there. I think what you are talking about is something the Bush Dock Company, not the Bush Dock Railway, does.

Q. That probably develops the fact that the eight cents is allowed by the trunk line carriers to the New York Dock Railway purely for the switching operation and it does not include any allowance to them similar to the allowance that is made on the Hoboken Manufacturers Railroad, which includes both switching and unloading?

A. It includes their complete service, switching, floating, unloading, when they are obligated to unload, but they are not obligated except to and from their own warehouse.

Q. So that any unloading that is performed in addition to the rate of 8 cents that they get, even if it is some other service that performs it, an extra charge is made for unloading, is that not right?

A. Where is that unloading done that you have in mind?

Q. Wherever the car is delivered for unloading.

A. You mean on a team track?

Q. It may be a team track, it may be the warehouse, it may be anywhere on the New York Dock Railway.

A. So far as the trunk lines are concerned, they are not authorized to assume the service of unloading except where they are obligated as a common carrier under the tariff to perform that service, and that is only in their own warehouses.

Q. They are allowing 8 cents to the New York Dock Railway per 100 pounds. Now, to the Hoboken Manufacturers Railroad they are allowing $1.01 for a ton of 2000 pounds——

A. $1.05.

EXAMINER TREZISE: What is it, $1.01 or $1.05?

MR. O'NEAL: That is $1.01.

A. Are you talking about carload traffic or less-than-carload traffic?

Q. We are speaking of carload traffic from which you make an allowance of $1.01 to include the service of unloading and delivery to consignee.

A. Where does your tariff—what tariff have you got to publish?

Q. I. C. C. 114.

A. What does that say?

Q. The division or allowance to the Hoboken Manufacturers Railroad Company is $1.01 a ton.

A. Yes, that is right, but what unloading are you obligated to do for that $1.01 a ton under your tariff? That is what I am not clear on and I cannot answer your question.

Q. We have this on export and import freight or any freight entitled to free lighterage, freight that is loaded and unloaded by the Hoboken Manufacturers Railroad, and on such freight you allow $1.01 per ton?

A. Yes.

Q. As distinguished from team track freight on which we only perform a switching service for which you allow 30 or 32 cents per ton?

A. That is right.

Q. What I am trying to get at is the comparison between the rate allowed the Hoboken Manufacturers Railroad on the same class of traffic that you allow to the New York Dock or the Bush Terminals.

A. You mean you want to compare the $1.01 on the carload traffic with the 8-cent or $1.60 a ton in carload traffic?

Q. Yes.

A. They perform an expensive float service that you do not perform at all.

Q. Is it not true that the Bush Terminal Railway and the New York Dock Railway are merely adjuncts of a larger operation and are really organized as common carriers for the purpose of helping to pay the expense of the railway operation, and they are merely adjuncts, they are not the main thing, their entire income is not absolutely dependent upon this, their existence is not dependent upon what they get out of the railway commission?

A. The Commission found they were common carriers. I cannot go further than that.

By Mr. Collins:

Q. There is the tariff of that allowance they get (handing paper to witness).

A. Yes, but that tariff does not show to what extent the Hoboken Shore Railroad is obligated to load and unload carload freight. I think Captain O'Neal has answered his own question.

Q. We are talking about different things. The Examiner's question is what the allowance was that the Hoboken got under the tariff, whether it was $1.01 or $1.05.

A. On the first claims mentioned here, on the 40 per cent. increase, under ex parte 74 rates, he gets $1.01. On those where the rates are increased 33 1/3 per cent., he gets 96 cents. That includes the loading, unloading and switching and all other service. On carload traffic he gets 32 cents

and 30 cents respectively. On less-than-carload traffic received at or delivered from freight station, foot of Fifth Street, Hoboken, he gets $1.11 and $1.05 respectively. The $1.05 is what we are talking about.

By Mr. O'Neal:

Q. Just one more question: Silk is a commodity moving under an inter-quantity or l. c. l. rate, is it not?

A. Yes, sir; from California.

Q. It is incumbent upon the railways to unload l. c. l. freight for delivery to consignee, is it not?

A. My dear fellow, no; I should say not.

Q. If they take it to their warehouse, their freight station, who is going to unload it if the carrier does not unload it?

A. All right, if it is a freight station, I will agree with you. But any other place than their freight stations—there are thousands of places in this eastern territory where the consignees unload their own freight at their own warehouses.

Q. If a road decides that its own facilities are inadequate and prefers to rent space somewhere else along its line to unload its freight, it has a perfect right to do so, has it not?

A. I don't know. I don't think it has a right to do so, and charge the expense to someone else.

By Mr. Collins:

Q. The point is this: If the railroad company here unloaded this freight into its Fifth Street warehouse, it would have to employ laborers and hands to handle the silk in and hold it there for the consignee.

A. Yes, but it says that it cannot unload in its Fifth Street warehouse. That was understood when they went over to Hoboken. It is known when this plant was located, that the silk was going to be unloaded direct from cars into the plant. The question arose who was going to unload it.

Mr. O'Neal said "We will do that," and he wants the trunk lines to pay for it.

EXAMINER TREZISE: Does that answer your question?

MR. O'NEAL: I think that answers the question.

Q. As to the insurance, we note by this sample that you have shown us that the transcontinental insurance applied until the freight is unloaded from the car, but if the railroad unloads the freight and holds it in its warehouse forty-eight hours, it must carry its own warehouse?

A. I understand so.

MR. O'NEAL: That is all.

By MR. CARMALT:

Q. One more question: When was this rate established in connection with the Hoboken Shore Road?

A. Do you mean when was the rate first established?

Q. Yes.

A. The first record I have, and I think it was the first time it was established, was by the Erie Road on October 1, 1897.

Q. In connection with the Hoboken Shore?

A. Yes.

Q. I am talking now about the rate established on silk in connection with Toll's tariff.

A. The through rate, I do not know.

Q. It was not made a party to that tariff when it began to handle the silk?

A. No; if it had been it probably would not be a party now.

Q. You would join with it on the theory that it would make delivery?

A. No, the eastern lines and the transcontinental lines put the Hoboken Shore Road as a party to that tariff in a general conclusive way without any thought.

Q. You don't know that, do you?
A. No, but I am making a pretty good guess.

(Witness excused.)

MR. COLLINS: Mr. Examiner, the copy of the insurance policy between the Hoboken Railroad and that insurance broker, which we were going to put in the record this morning—may we now offer it? May the record show that this is the exhibit that was to be filed within ten days after the hearing?

(The paper was thereupon received in evidence, marked "Complainant's Exhibit No. 8, Witness Baker," and is forwarded herewith.)

MR. COLLINS: There is one other thing: Mr. Examiner, at another point this morning, Mr. O'Neal referred to some page in this Port Authority Report in connection with an estimated cost of dock service, floating and pier service, and so forth. I wonder if we may let his testimony stand as it is and withdraw the offer of the particular document.

EXAMINER TREZISE: I think you may do so. The Examiner sees no objection to your not filing the exhibit unless you want to.

MR. COLLINS: Just to let his testimony stand as an estimated cost. Of course, if the defendants do not agree with that estimation, they may have their say.

EXAMINER TREZISE: Do the parties desire to file briefs?

MR. CARMALT: Yes.

MR. PIERCE: Will the Examiner set the date as far as your executive authority allows you, because if you give us thirty days, we will run into Christmas and I do not like to have this on my mind when Santa Claus is due.

EXAMINER TREZISE: In view of the pressing engagement of counsel, as has been related, the Examiner will assign January 3 as the date for filing all briefs. Will the complainant please show a brief map of the situation in his brief?

It is understood that reference will be given that Erie switching tariff carrying its charge for switching a car from the West Shore interchange to the Hoboken Manufacturers' Railroad at Weehawken, and that this reference will be given within ten days after the hearing.

It is understood that the free copy for the complainant will be sent to Mr. Charles D. O'Neal and the free copy for the defendants will go to Mr. W. B. Pierce.

If there is nothing further, the hearing is closed.

(Whereupon, at 5 o'clock P. M., November 22, the hearing in the above entitled matter was closed.)

D.L.& W. R.R.
D.L.& W. R.R.
AVE
PATTERSON
AVE.
TROLLEY LINE
KING ST.
DOVE ST
MARSHALL ST.
HARRISON ST.
JACKSON
MUNROE
MADISON
JEFFERSON
ADAMS
GRAND
CLINTON
WILLOW
PARK
CHURCH
AVE.
NEWARK
ST
ST.
ST.
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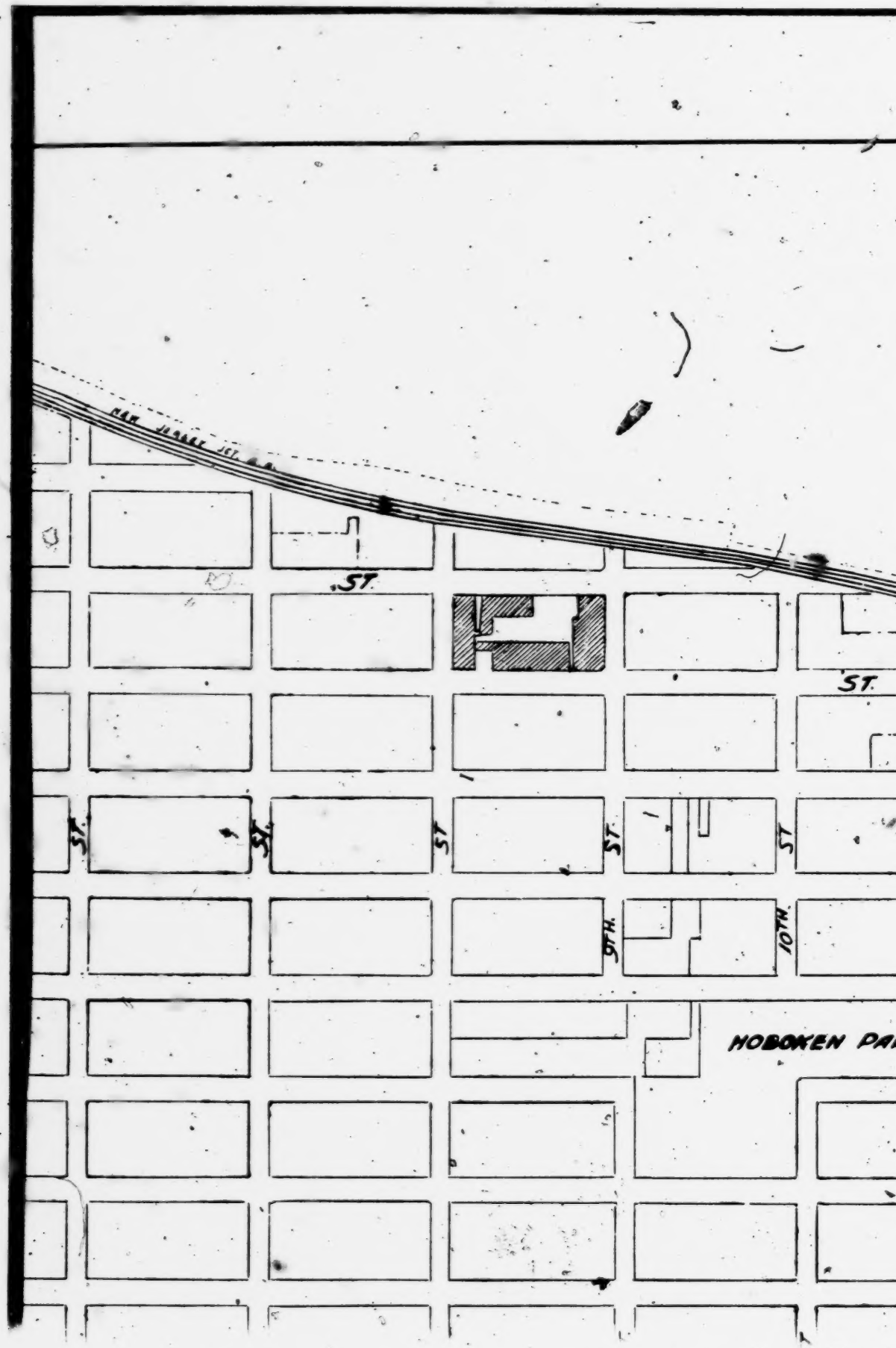
ST.


NEW JERSEY R.R.
ST.
ST.
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9TH.
10TH.
HOBOKEN PA

EXIT TRACKS
CONSUMERS ICE CO.
ST.
ST.
ST.
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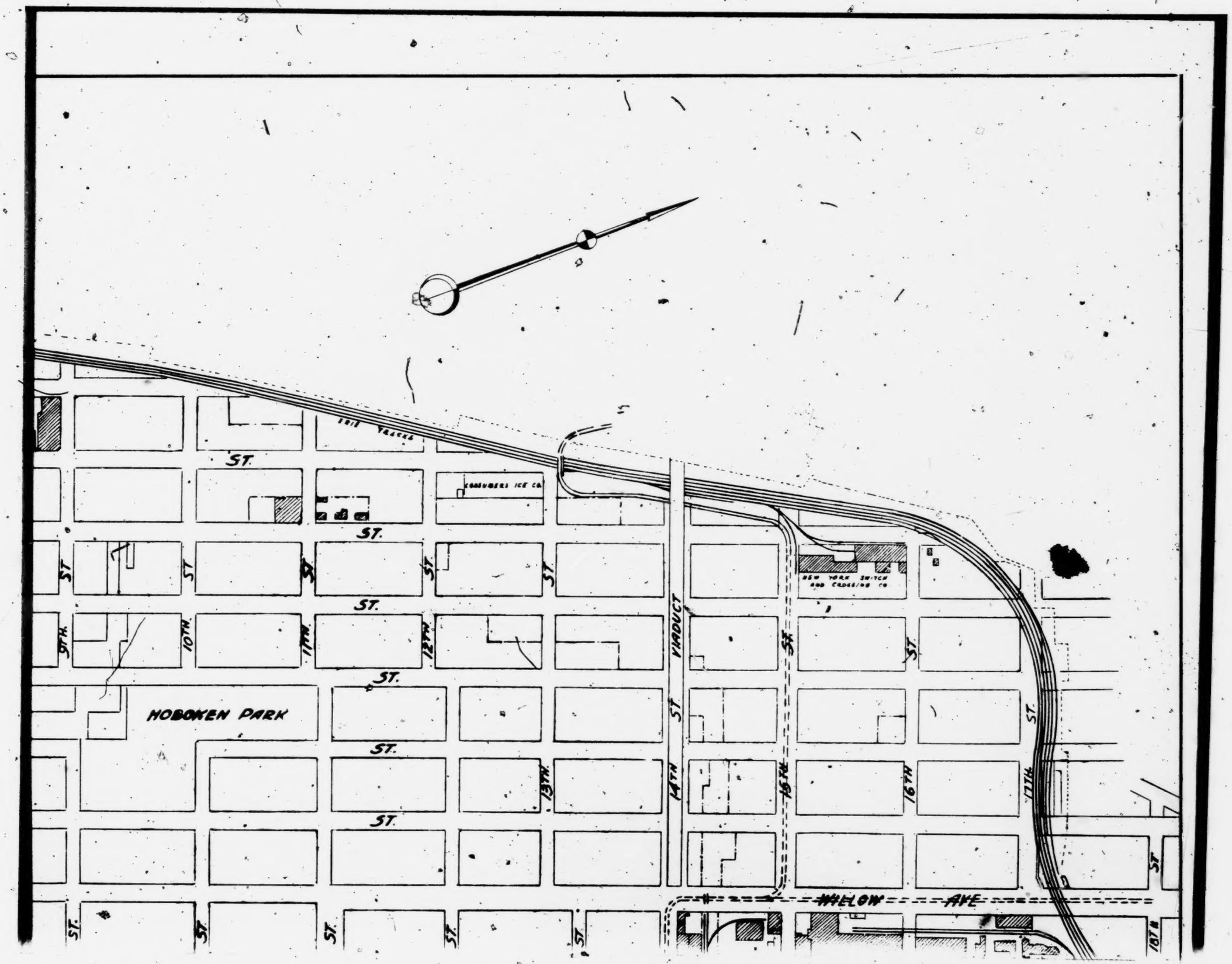
11TH.
12TH.
13TH.
14TH ST. VIADUCT
15TH.


ERIE TRACKS
ST.
KNICKERBOCKER ICE CO.
NEW YORK SWITCH AND CRADLE CO.
HOBOKEN PARK
9TH.
10TH.
11TH.
12TH.
13TH.
14TH.
15TH.
16TH.
17TH.
18TH.
VIADUCT
WILLOW AVE.

CLINTON

WILLOW

PARK

GARDEN

BLOOMFIELD

WASHINGTON

HUDSON

RIVER

CHURCH SQUARE

AVE.

HUDSON SQUARE

ST.

CASTLE

CASTLE POINT
STEVENS INSTITUTE

FERRY ST.

1ST.

2ND.

3RD.

4TH.

5TH.

6TH.

7TH.

8TH.

NEWARK

HUDSON PL.

D.L.&W.R.R. FERRY

U.S. GOV. PIER No. 6

U.S. GOV. PIER No. 5

U.S. GOV. PIER No. 4

U.S. GOV. PIER No. 3

U.S. GOV. PIER No. 2

U.S. GOV. PIER No. 1

No. 7

No 8

No. 9

H

7TH. 8TH. 9TH. 10TH. 11TH. 12TH. 13TH. 14TH. 15TH. 16TH.

ST. ST. ST. ST. ST. ST. ST. ST. ST.

WILLOW

PARK AVE

PLANT BRIDGE

CASTLE POINT TERRACE

CASTLE POINT
STEVENS INSTITUTE

HOBOKEN MANUFACTURERS R.R.

PENNSYLVANIA R.R. CO.

WILSON LINE PIER

PIER HEAD LINE

NO. 10 D.L.&W. PIER NO. 1

NO. 11

PIER NO. 12

NO. 13 W. & A. FLETCHER PIER

D.L.&W.R.R. FERRY

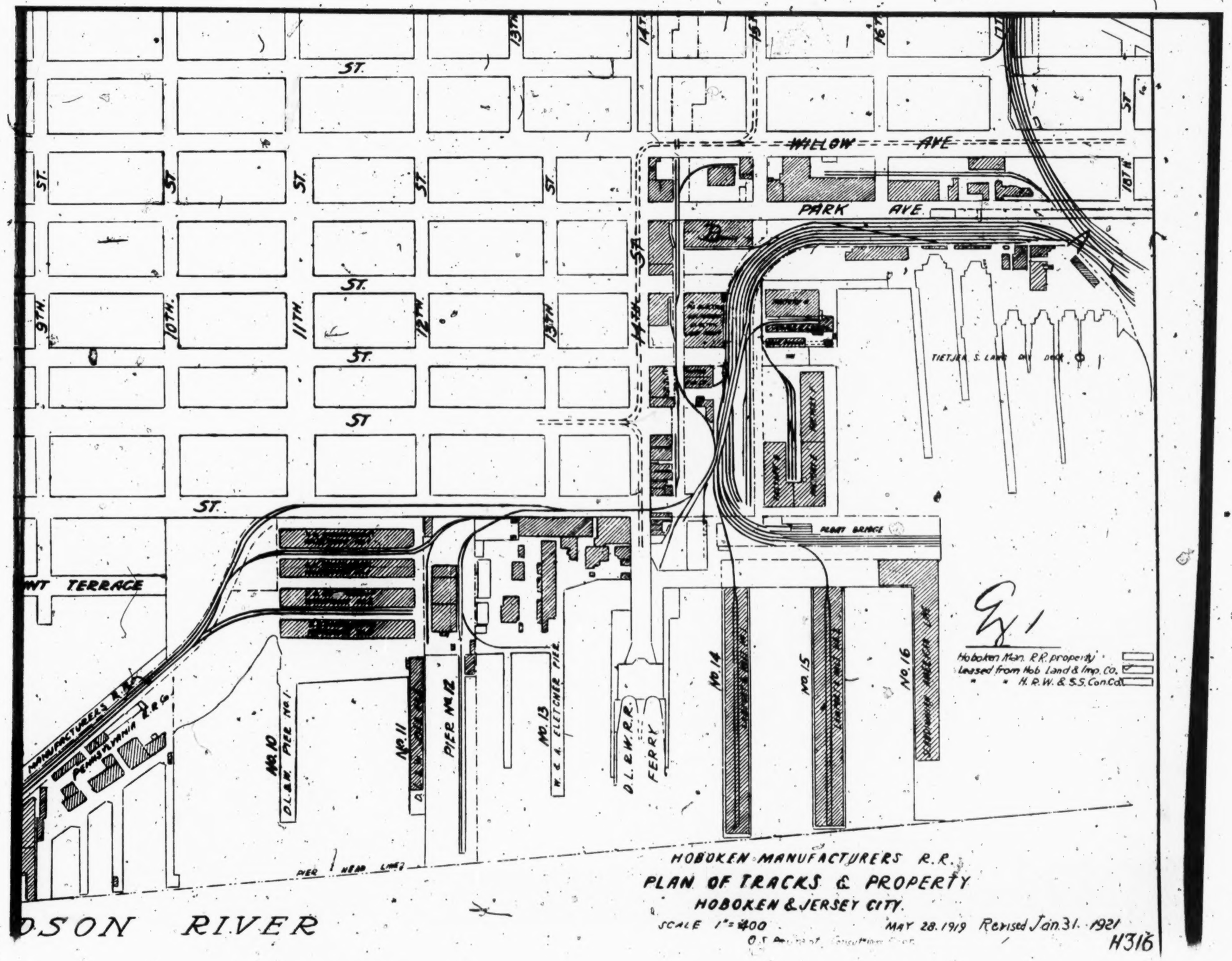
NO. 14

NO. 15

NO. 16

HUDSON RIVER

HOBOKEN MANUFACTURERS
PLAN OF TRACKS & PROP
HOBOKEN & JERSEY CITY.
SCALE 1"=400 MAY



HOBOKEN MANUFACTURERS R.R.

PLAN OF TRACKS & PROPERTY

HOBOKEN & JERSEY CITY.

SCALE 1"=400 MAY 28. 1919 Revised Jan. 31. 1921

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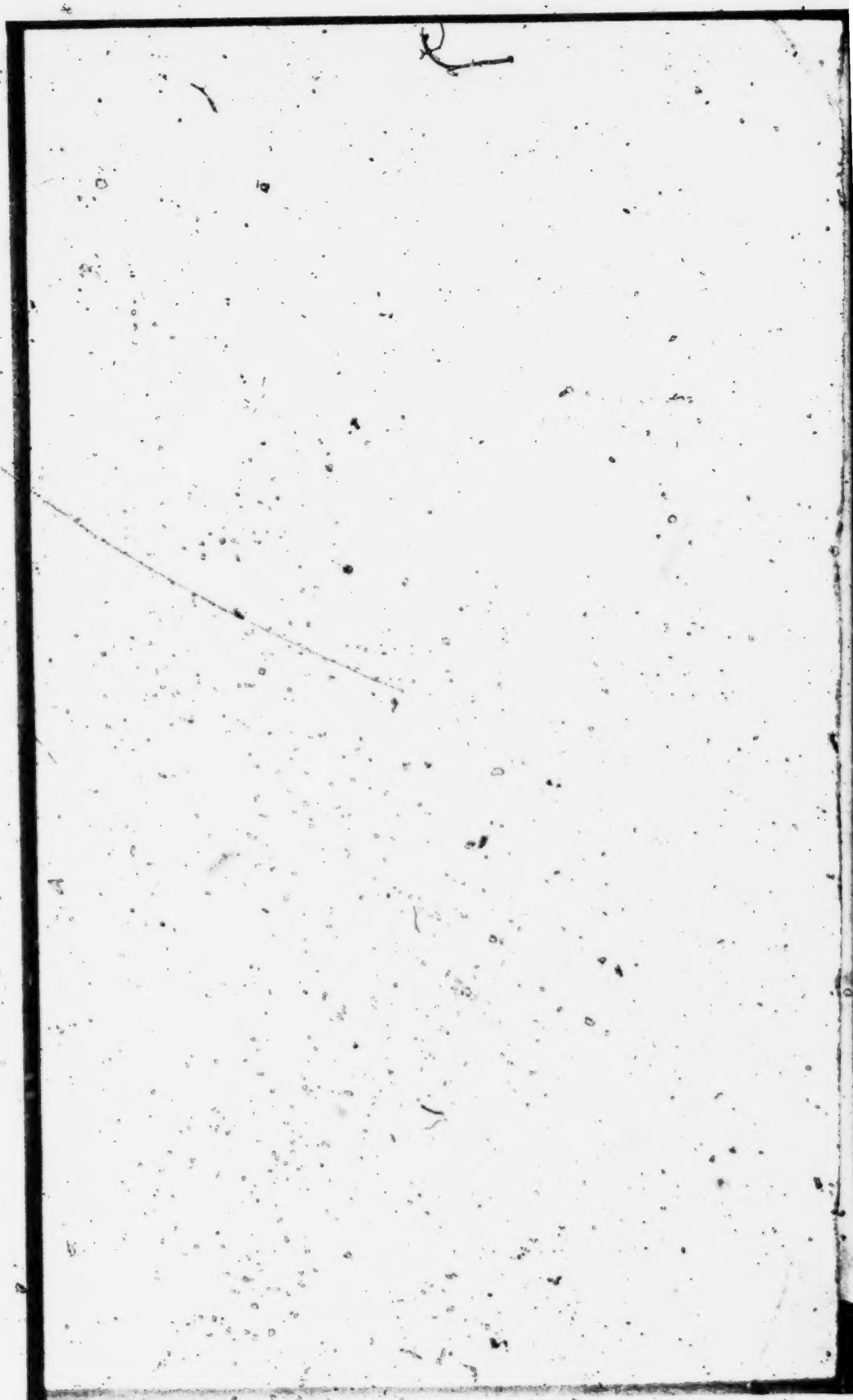


COMPLAINANT'S EXHIBIT NO. 2, Witness O'Neal.

STATEMENT OF COST TO

HOBOKEN MANUFACTURERS' RAILROAD COMPANY OF SWITCHING, HANDLING, UNLOADING AND DELIVERING CARLOADS OF SILK RECEIVED FROM TRUNK LINES AT HOBOKEN, N. J.

	Per Car		Per Ton Cents	Per 100 Lbs. Cents
Switching (A)	$14.93		74.65	3.73
Terminal Insurance	45.00		225.0	11.25
Policing	5.00		25.0	1.25
Unloading and Delivering	24.00		120.00	6.0
Totals	$88.93	(B)	444.65	22.23

(A) Average expense (does not include cost of unloading, handling and delivering) in switching one car of ordinary traffic; based on total switching cost, $187,714.08, incurred during entire year 1925, divided by total number of loaded cars, 12,565, switched during that year.

(B) Based on 40,000 pounds (20 tons) per car, Silk loading.

COMPLAINANT'S EXHIBIT NO. 3, Witness Brown.

(Copy)

D. E. DOUTY
Vice-President & General Manager

Testing Houses
New York, N. Y.
Hoboken, N. J.
Philadelphia, Pa.
Paterson, N. J.
New Bedford, Mass.
Chicago, Ill.
Shanghai, China

Chemical and Research Laboratories and Textile Storage Warehouse
Hoboken, N. J.
Cable Address:
Ustestco, New York

OFFICERS
E. J. Stehli, President
William Hand, First Vice-President
Ramsay Peugnet, Secretary & Treasurer

DIRECTORS

Horace B. Cheney	Edward F. L. Lotte
Wm. H. Folwell	George A. Post
Marcus Frieder	W. H. Rossmassler
Joseph Gerli	Carl Schoen
James A. Goldsmith	William Skinner
William Hand	E. J. Stehli
Oscar Heineman	S. Tajima
Malcom D. Whitman	

UNITED STATES TESTING COMPANY, Inc.
TEXTILE STORAGE WAREHOUSE
1415 Park Avenue
Hoboken, N. J.

Phone Hoboken 9800

September 27, 1926.

Hoboken Manufacturers' Railroad Co.,
Foot of Fifth Street,
Hoboken, N. J.

Gentlemen:

We transmit herewith our invoice of September 25, 1926, covering the service rendered for you of unloading, space during free time and delivery of raw silk received over your railroad during the period from August 14, 1926 to September 18, 1926 inclusive.

This invoice has not been rendered earlier because it is our purpose to bill you the actual costs of the service rendered and that cost could only be determined after the experience of handling a considerable quantity of raw silk.

The invoice herewith represents the receipt by us of 7,460 bales, the average weight per bale being 133 pounds. The total poundage being 992,180 pounds or 496.09 tons.

For the sake of convenience, we have billed this poundage as bales of 133 pounds at eight cents per bale which you will see is $ .0601 per 100 pounds. This cost is made up as follows:

Labor, unloading and checking	$ .024678
Storage 48 hours @ 25¢ per month	.012531
Labor, delivery	.015037
Overhead	.007837
Total cost	$ .060083

If our further experience warrants a decrease or an increase in the cost to us, you will be billed accordingly.

Very truly yours,

UNITED STATES TESTING CO., INC.

By E. C. Brown.

ECB:LLS

SUMMARY OF COSTS FOR UNLOADING, CHECKING, STORAGE AND DELIVERY OF BALES OF RAW SILK RECEIVED VIA HOBOKEN MANUFACTURERS' RAILROAD COMPANY.

AUGUST 14 TO SEPTEMBER 22, 1926.

Total bales received		7,460
Average weight per bale		133 pounds
Total weight received		992,180 pounds
Total tons received		496.09
Total time unloading		29.5 hours
Number of men		10
Total man hours		295
Rate of pay per man		75¢ per hour
Cost to unload		$221.25
Checker, 29.5 hours at 80¢ per hour		23.60
Labor cost		$244.85
Cost per ton unloading	$ .4935	
Space at 25¢ per month per bale for two days	$ .01666	
Storage on 7,460 bales at .01666 per bale		$124.33
Delivering cost 7,460 bales at 2¢ per bale		149.20
Total labor and space cost		$518.38
Plus 15% overhead		77.76
Total cost		$596.14

ANALYSIS:

Labor, unloading and checking	$ .024678
Storage 48 hours at 25¢ per month	.012531
Labor, delivery	.015037
Overhead	.007837
Total cost per 100 pounds	$ .060083
Total cost per bale	$ .079901

SUMMARY OF COSTS FOR UNLOADING, CHECKING, STORAGE AND DELIVERY OF BALES OF RAW SILK RECEIVED VIA HOBOKEN MANUFACTURERS' RAILROAD COMPANY.

SEPTEMBER 22nd TO 30th, 1926.

Total bales received		4,247
Average weight per bale		133 pounds
Total weight received		564,851 pounds
Total tons received		282.425
Total time unloading		16.5666 hours
Total man hours		119.833
Rate of pay per man		75¢ per hour
Cost to unload		$ 89.8747
Checker, 16.5666 hours at 80¢ per hour		13.2532
Labor cost		$103.1279
Cost per ton unloading	$ .36515	
Space at 25¢ per month per bale for two days	$ .01666	
Storage on 4,247 bales at $ .01666 per bale		$ 70.755
Delivering cost 4,247 bales at 2¢ per bale		84.940
Total labor and space cost		$258.8229
Plus 15% overhead		38.8233
Total cost		$297.6462

ANALYSIS:

Labor, unloading and checking	$ .018258	
Storage 48 hours at 25¢ per month	.012531	
Labor, delivery	.015037	
Overhead	.006873	
Total cost per 100 pounds	$ .052699	
Total cost per bale	$ .070084	

ECB:10.2326

SUMMARY OF COSTS FOR UNLOADING, CHECKING, STORAGE AND DELIVERY OF BALES OF RAW SILK RECEIVED VIA HOBOKEN MANUFACTURERS' RAILROAD COMPANY.

OCTOBER 1st TO 14th, 1926.

Total bales received		5,531
Average weight per bale		133 pounds
Total weigh received		735,623 pounds
Total tons received		367.811
Total time unloading		19 1/6 hours
Total man hours		160
Rate of pay per man		75¢ per hour
Cost to unload		$120.00
Checker, 19 1/6 hours at 80¢ per hour		15.3333
Labor cost		$135.3333
Cost per ton unloading	$ .36794	
Space at 25¢ per month per bale for two days	$ .01666	
Storage on 5,531 bales at $ .01666 per bale		$ 92.1465
Delivery cost 5,531 bales at 2¢ per bale		110,62
Total labor and space cost		$338.0998
Plus 15% overhead		50.7149
Total cost		$388.8147

ANALYSIS:

Labor, unloading and checking	$ .018397
Storage 48 hours at 25¢ per month	.012531
Labor, delivery	.015037
Overhead	.006894
Total cost per 100 pounds	$ .052859
Total cost per bale	$ .070297

ECB:11.426

SUMMARY OF COSTS FOR UNLOADING, CHECKING, STORAGE AND DELIVERY OF BALES OF RAW SILK RECEIVED VIA HOBOKEN MANUFACTURERS' RAILROAD COMPANY.

OCTOBER 18th TO 30th, 1926.

Total bales received		5,055
Average weight per bale		133 pounds
Total weight received		672,315 pounds
Total tons received		336.158
Total time unloading		17.1166 hours
Total man-hours		155 7/15 hours
Rate of pay per man		75¢ per hour
Cost to unload		$116.60
Checker, 17.1166 hours at 80¢ per hour		13.6933
Labor cost		$130.2933
Cost per ton unloading	$ .38759	
Space at 25¢ per month per bale for two days	$ .01666	
Storage on 5,055 bales at $ .01666 per bale		84.2163
Delivery cost 5,055 bales at 2¢ per bale		101.10
Total labor and space cost		$315.6096
Plus 15% overhead		47.3414
Total cost		$362.9510

ANALYSIS:

Labor, unloading and checking	$ .019379
Storage 48 hours at 25¢ per month	.012531
Labor, delivery	.015037
Overhead	.007042
Total cost per 100 pounds	$ .053989
Total cost per bale	$ .0718

DEFENDANTS' EXHIBIT NO. 4, Witness Toll.

RAILWAY REVENUES AND EXPENSES

CLASS I RAILWAYS AND LARGE SWITCHING AND TERMINAL COMPANIES

— UNITED STATES —

Account	For the 8 Months Ended August 31 1926	1925	Increase 1926 over 1925 Amount	Per Cent
Total Operating Revenues	$4 163 562 608	$3 974 000 199	$189 562 409	4.8
Freight	3 077 846 593	2 901 616 994	176 229 599	6.1
Passenger (a)	701 340 661	700 944 552	396 109	0.1
Mail	62 825 827	63 533 798	d 707 971	d 1.1
Express	92 695 518	90 041 433	2 654 085	2.9
All Other	228 854 009	217 863 422	10 990 587	5.0
Total Operating Expenses	3 094 130 637	3 011 196 506	82 934 131	2.8
Maintenance of Way & Structures	574 588 433	540 863 711	33 724 722	6.2
Maintenance of Equipment	855 305 031	840 887 427	14 417 604	1.7
Traffic	75 554 675	69 717 684	5 836 991	8.4
Transportation	1 438 608 298	1 416 458 509	22 149 789	1.6
General	123 106 773	115 782 699	7 324 074	6.3
All Other	26 967 427	27 486 476	d 519 049	d 1.9
Net Operating Revenue	1 069 431 971	962 803 693	106 628 278	11.1
Taxes	253 420 509	232 323 404	21 097 105	9.1
Uncollectible	1 061 328	1 156 104	d 94 776	d 8.2
Operating Income	814 950 134	729 324 185	85 625 949	11.7
Equipment Rents	Dr 53 828 333	Dr 50 142 941	d 3 685 392	d 7.3
Joint Facility Rents	Dr 16 177 635	Dr 15 053 688	d 1 123 947	d 7.5
Net Railway Operating Income	744 944 166	664 127 556	80 816 610	12.2
Operating ratio—per cent	74.31	75.77	———	—
Average Mileage Represented	236 878.84	236 590.05	288.79	0.1

(a) Sleeping and parlor car surcharge in passenger revenue for 1926 as follows: 8 months, $27 841 319; for 1925, 8 months, $25 715 018. d—Decrease.

SOURCE:—Monthly Reports of Carriers to Interstate Commerce Commission.

RATE OF RETURN—8 MONTHS ENDED AUGUST 31, 1926 AND 1925.

Region and District	Net Railway Operating Income 1926	1925	Rate of Return (annual basis) 1926	1925
New England Region	$ 28 907 608	$ 26 302 019	5.02%	4.56%
Great Lakes Region	141 155 196	135 021 886	5.60	5.48
Central Eastern Region	162 309 466	147 859 529	5.24	4.86
Pocahontas Region	56 720 819	43 576 010	8.80	7.17

Region and District	Net Railway Operating Income 1926	Net Railway Operating Income 1925	Rate of Return (annual basis) 1926	Rate of Return (annual basis) 1925
New England Region	$ 28 907 608	$ 26 302 019	5.02%	4.56%
Great Lakes Region	141 155 196	135 021 886	5.60	5.48
Central Eastern Region	162 309 466	147 859 529	5.24	4.86
Pocahontas Region	56 720 819	43 576 010	8.80	7.17
Total Eastern District (Incl. Pocahontas Reg.)	$389 093 089	$352 759 444	5.69	5.27
Southern District (Excl. Pocahontas Reg.)	105 483 054	102 550 491	5.77	5.88
Northwestern Region	69 340 080	57 343 184	3.70	3.09
Central Western Region	123 165 505	98 491 289	4.54	3 69
Southwestern Region	57 862 438	52 983 148	4.59	4.30
Total Western District	$250 368 023	$208 817 621	4.28	3.63
United States	$744 944 166	$664 127 556	5.13	4.68

NOTE: "Rate of return (annual basis)" is computed on the investment of the carriers as shown by their books, including materials and supplies and cash, as of the beginning of the year, and is computed so as to reflect seasonal fluctuations in traffic and earnings.

STATISTICAL BUREAU—WESTERN LINES
CHICAGO.

DEFENDANTS' EXHIBIT NO. 5, Witness Toll.

PROPERTY INVESTMENT, NET RAILWAY OPERATING INCOME AND RATE OF RETURN

CLASS I RAILROADS—WESTERN DISTRICT—1925

	Average Mileage Operated	Property Investment (701-702)	Materials & Supplies (716)	Cash (708)	Total Property Investment	Net Railway Operating Income 1925	Rate of Return
Atchison, Topeka & Santa Fe Sys. (a)	11 836 98	$ 920 467 963	$ 27 580 741	$ 35 558 426	$ 983 607 130	$ 53 666 692	5.46%
Bingham & Garfield	34 05	7 372 165	186 760	504 451	8 063 376	179 811	2.23
Chicago & Alton	1 050 86	154 138 288	1 717 996	2 516 480	158 372 764	4 547 871	2.87
Chicago & North Western	8 462 83	493 582 386	13 941 088	12 678 992	520 202 466	21 108 750	4.06
Chicago, St. Paul, Minneapolis & Omaha	1 749 19	88 111 012	2 239 278	1 117 585	91 467 875	3 221 619	3.52
Chicago & North Western System	10 212 02	581 693 398	16 180 366	13 796 577	611 670 341	24 330 369	3.98
Chicago, Burlington & Quincy	9 407 23	575 464 188	18 525 883	17 048 439	611 038 510	28 131 918	4.60
Quincy, Omaha & Kansas City	250 84	6 461 201			6 461 201	Def 176 274	D2.73
Colorado & Southern	1 091 63	86 388 700	1 201 610	3 929 451	91 519 761	1 617 166	1.77
Ft. Worth & Denver City	456 64	30 784 481	820 409	4 833 542	36 438 432	3 521 773	9.66
Wichita Valley	271 92	6 047 978	188 192	493 112	6 729 282	522 544	7.77
Chicago, Burlington & Quincy System	11 478 26	705 146 548	20 736 094	26 304 544	752 187 186	33 617 127	4.47
Chicago, Great Western	1 496 06	170 931 517	1 190 471	2 025 949	174 147 937	2 087 913	1.20
Chicago, Milwaukee & St. Paul	10 986 92	720 663 283	13 575 288	7 843 984	742 082 555	16 873 636	2.27
Chicago, Peoria & St. Louis	247 13	8 266 774	134 549	61 519	8 462 842	Def 214 943	D2.54
Chicago, Rock Island & Pacific Lines (b)	8 072 69	412 079 151	11 552 980	5 763 437	429 395 568	17 926 384	4.17
Denver & Rio Grande Western	2 600 30	193 886 647	3 809 294	2 151 193	199 847 134	6 758 785	3.38
Denver & Salt Lake	255 18	17 806 152	362 547	543 064	18 711 763	678 135	3.62
Duluth & Iron Range	278 93	31 070 980	823 858	1 352 046	33 246 884	1 589 496	4.78
Duluth, Missabe & Northern	305 20	48 372 408	1 703 421	499 930	50 575 759	8 123 036	16.06
Duluth, Winnipeg & Pacific	178 88	17 201 379	108 242	——	17 309 621	268 543	1.55
Ft. Smith & Western	249 75	6 937 286	210 020	160 557	7 307 863	289 475	3.96
Great Northern	8 251 44	513 061 587	9 808 604	19 178 497	542 048 688	28 276 183	5.22
Green Bay & Western	234 15	10 658 448	312 011	442 323	11 412 782	264 693	2.32
International—Great Northern	1 159 50	45 136 893	2 396 352	1 984 807	49 518 052	2 239 657	4.52
Kansas City, Mexico & Orient Sys. (c)	737 95	29 157 766	465 112	807 385	30 430 263	89 044	.29
Kansas City Southern System (d)	854 09	108 292 096	2 061 806	1 775 150	112 129 052	4 493 426	4.01
Kansas, Oklahoma & Gulf System	314 42	18 821 086	201 149	245 708	19 267 943	6 359	.03
Lake Superior & Ishpeming	161 51	7 519 339	320 495	196 558	8 036 392	612 857	7.63
Louisiana & Arkansas	302 25	13 773 041	381 652	683 860	14 838 553	863 230	5.82
Louisiana Ry. & Navigation System (e)	544 71	26 052 340	561 129	217 073	26 830 542	34 112	.13
Midland Valley	364 90	20 876 833	215 805	459 898	21 552 536	1 190 359	5.52
Minneapolis & St. Louis	1 647 26	65 330 900	1 869 020	426 246	67 626 166	363 865	.54
Minneapolis, St. Paul & S. S. Marie	4 402 53	216 251 642	4 890 363	1 667 029	222 809 034	8 959 230	4.02
Duluth, South Shore & Atlantic	591 30	49 078 505	619 480	344 989	50 042 974	618 694	1.24
Missouri-Kansas-Texas Lines (f)	3 193 14	273 937 157	6 353 075	3 347 315	283 637 547	12 825 624	4.52
Missouri & North Arkansas	364 57	3 762 525	205 061	294 971	4 262 557	Def 38 098	.89
Missouri Pacific	7 359 97	418 392 110	12 007 235	4 887 237	435 286 582	18 013 064	4.14
Nevada Northern	165 87	3 179 776	185 350	834 916	4 200 042	314 248	7.48
Gulf Coast Lines (m)	860 19	38 754 326	1 488 007	638 323	40 880 656	3 717 174	9.09
Northern Pacific	6 679 94	567 460 465	12 196 206	9 229 907	588 886 578	22 227 319	3.77
Northwestern Pacific	488 36	68 848 020	831 749	345 763	70 025 532	1 158 222	1.65
St. Louis San Francisco System (g)	5 132 24	415 736 858	4 931 297	9 145 865	429 814 020	22 048 489	5.13
St. Louis Southwestern System (h)	1 777 01	119 076 769	3 597 841	4 616 335	127 290 945	4 769 091	3.75
San Antonio & Aransas Pass	(Included in Southern Pacific—Texas Lines)						
San Antonio, Uvalde & Gulf	317 26	5 915 500	155 553	92 437	6 163 490		

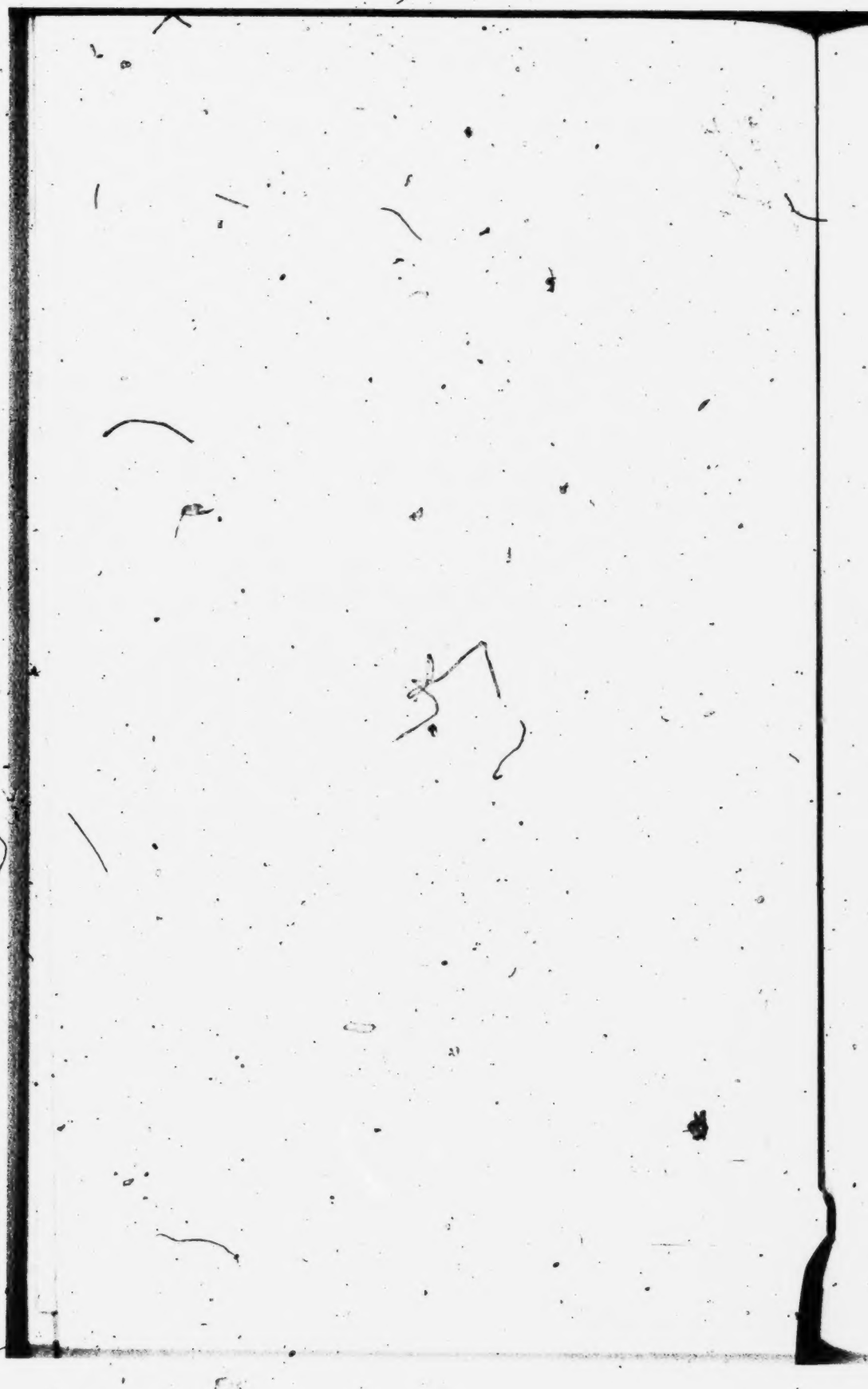
Missouri-Kansas-Texas Lines (f)	3 193 14	273 937 157	6 353 075	3 347 315	283 637 547	12 825 624	4.52
Missouri & North Arkansas	364 57	3 762 525	205 061	294 971	4 262 557	Def 38 098	.89
Missouri Pacific	7 359 97	418 392 110	12 007 235	4 887 237	435 286 582	18 013 064	4.14
Nevada Northern	165 87	3 179 776	185 350	834 916	4 200 042	314 248	7.48
Gulf Coast Lines (m)	860 19	38 754 326	1 488 007	638 323	40 880 656	3 717 174	9.09
Northern Pacific	6 679 94	567 460 465	12 196 206	9 229 907	588 886 578	22 227 319	3.77
Northwestern Pacific	488 36	68 848 020	831 749	345 763	70 025 532	1 158 222	1.65
St. Louis San Francisco System (g)	5 132 24	415 736 858	4 931 297	9 145 865	429 814 020	22 048 489	5.13
St. Louis Southwestern System (h)	1 777 01	119 076 769	3 597 841	4 616 335	127 290 945	4 769 091	3.75
San Antonio & Aransas Pass	(Included in Southern Pacific—Texas Lines)						
San Antonio, Uvalde & Gulf	317 26	5 915 500	155 553	92 437	6 163 490	170 778	2.77
Southern Pacific—Pac. System)	8 694 51	1 045 928 064	20 490 254	23 014 064	1 089 432 382	40 946 019	3.76
Arizona Eastern (							
El Paso & Southwestern)							
Southern Pacific—Texas Lines (k)	3 747 62	192 885 197	9 235 296	3 151 078	205 271 571	8 440 084	4.11
Southern Pacific—Louisiana Lines (l)	608 41	42 721 156	1 776 455	428 059	44 925 670	579 924	1.29
Southern Pacific System	13 050 54	1 281 534 417	31 502 005	26 593 201	1 339 629 623	49 966 027	3.73
Spokane International	165 69	6 050 310	130 363	18 244	6 198 917	255 882	4.13
Spokane, Portland & Seattle	554 60	63 372 667	727 235	490 190	64 590 092	1 773 047	2.75
Texas & Pacific	1 952 74	136 684 234	4 072 950	4 509 716	145 266 900	5 974 105	4.11
Toledo, Peoria & Western	247 70	9 830 310	159 192	262 484	10 251 986	Def 236 939	D2.31
Trinity & Brazos Valley	368 89	11 686 045	332 098	762 250	12 780 393	Def 364 263	D2.85
Union Pacific System (n)	9 789 12	828 252 999	19 441 089	21 840 944	869 535 032	40 658 517	4.68
Utah	102 18	8 951 043	206 657	147 230	9 304 930	460 843	4.95
Vicksburg, Shreveport & Pacific	188 46	10 959 254	499 460	549 895	12 008 609	617 968	5.15
Western Pacific	1 042 68	114 150 983	1 879 871	752 387	116 783 241	4 298 499	3.68
TOTAL WESTERN DISTRICT	132 650 37	$9 506 580 183	$224 877 899	$216 871 290	$9 948 329 372	$407 343 636	4.09%

(a) Includes Atchison, Topeka & Santa Fe, Gulf, Colorado & Santa Fe, and Panhandle & Santa Fe.
(b) " Chicago, Rock Island & Pacific and Chicago, Rock Island & Gulf.
(c) " Kansas City, Mexico & Orient and Kansas City, Mexico & Orient of Texas.
(d) " Kansas City Southern and Texarkana & Fort Smith.
(e) " Louisiana Ry. & Navigation Company and Louisiana Ry. & Navigation Company of Texas.
(f) " Missouri-Kansas-Texas and Missouri-Kansas-Texas of Texas.
(g) " St. Louis San Francisco, St. Louis San Francisco & Texas, and Fort Worth & Rio Grande.
(h) " St. Louis Southwestern and St. Louis Southwestern of Texas.
(k) " Galveston, Harrisburg & San Antonio, San Antonio & Aransas Pass, Houston & Texas Central, Houston East & West Texas, and Texas & New Orleans.
(l) " Louisiana Western, and Morgan's Louisiana & Texas R. R. & S. S. Company.
(m) " New Orleans, Texas & Mexico, Beaumont, Sour Lake & Western, and St. Louis Brownsville & Mexico.
(n) " Los Angeles & Salt Lake, Oregon Short Line, Oregon-Washington R. R. & Nav. Co., and St. Joseph & Grand Island.

SOURCE: Annual Reports of Railway to the Interstate Commerce Commission.

NOTE: Property Investment, Materials and Supplies, and Cash, as of December 31, 1924.

STATISTICAL BUREAU—WESTERN LINES
CHICAGO



DEFENDANTS' EXHIBIT NO. 6, Witness Gillette.

LIST OF SHORT LINES CONNECTING WITH C&NW RY. AND CSTPM&O RY.

Name of Short Line	Mileage	Minimum Division to Short Lines
Clinton, Davenport & Muscatine Ry...	29.6	25%
Cazenovia Southern R. R.	6	25%
Cedar Rapids & Iowa City Ry.	44.3	25%
Chicago, Harvard & Geneva Lake Ry.	11	25%
Des Moines & Central Iowa R. R.	58.5	25%
Escanaba & Lake Superior R. R.	63.5	25%
Fairchild & Northeastern Ry.	38	25%
Ft. Dodge, Des Moines & Southern R. R.	185	25% & 40%
Hillsboro & North Eastern Ry.	5	25%
La Crosse & South Eastern Ry.	42.2	30%
La Salle & Bureau County R. R.	10	24.5¢ net ton
Mason City & Clear Lake R. R.	10	25%
Marinette, Tomahawk & Western R. R.	33.1	25%
North & South Ry.	35.2	30%
Waterloo Cedar Falls & Northern Ry.	82.5	33-1/3%

The revenue accruing to the short lines named above on the division basis as indicated, comes out of the revenue of the C. & N. W. Railway west of Chicago, Chicago Junctions, etc., after division of the through rate or combination of local rates have been divided with the Eastern Lines. In other words the Eastern Lines do not participate in the revenue allowed the short lines west of Chicago.

DEFENDANTS' EXHIBIT NO. 7, Witness Gillette.

NORTH PACIFIC COAST SHORT LINE RAILWAYS AND MILEAGE.

Name of Railroad	Miles
Camas Prairie R. R. Co.	151.
Coeur D'Alene & Pend d'Oreille Ry. Co.	9.7
Inland Empire R. R. Co.	76.7
Longview, Portland & Northern Ry. Co.	11.
Oregon Electric Ry. Co.	154.
Pacific Coast R. R. Co.	53.7
Pacific Northwest Traction Co.	62.
Port Townsend and Puget Sound Ry. Co.	26.2
Spokane Eastern Ry.	40.4
Walla Walla Valley Ry. Co.	37.
Washington, Idaho & Montana Ry. Co.	50.
Yakima Valley Transportation Co.	43.8

SOUTH PACIFIC COAST SHORT LINE RAILWAYS AND MILEAGE.

Arizona Southern R. R.	20.3
Central California Traction Co.	53.
Fresno Interurban Ry. Co.	14.7
Holton Interurban Ry. Co.	11.
Inter California Ry.	52.6
McCloud River R. R.	46.5
Nevada Copper Belt R. R.	37.8
Pacific Coast Ry. Co.	76.
Pacific Electric Ry.	60.0
Peninsular Ry.	63.2
Sacramento Valley & Eastern Ry.	14.44
San Diego & Arizona Ry.	156.
Visalia Electric R. R.	55.1

COMPLAINANT'S EXHIBIT NO. 8, Witness Baker.

1. HOBOKEN MANUFACTURERS' RAILROAD COMPANY

and/or

HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING COMPANY FOR ACCOUNT OF THEMSELVES AND/OR OTHER COMMON CARRIERS AS OWNERS, LESSEES, OPERATORS OR CARRIERS, JOINTLY OR SEVERALLY, AS THEIR RESPECTIVE INTERESTS MAY APPEAR.

2. For account of whom it may concern.
3. Loss, if any, to be adjusted with and payable to the HOBOKEN MANUFACTURERS' RAILROAD COMPANY.
4. To cover raw silk, manufactured silk, silk goods, wild silk, waste silk, pongees, silk worms, their eggs, and cocoons and/or silk and/or silk goods of whatever nature and/or whatever name known by.
5. This insurance is to cover only the Legal Liability of the Hoboken Manufacturers' Railroad Company, et al., as common carriers, warehousemen or otherwise on above merchandise while in their care or custody without regard to time or place.
6. Merchandise is valued at invoice value plus freight and all charges when prepaid.
7. This policy is to attach and cover on all merchandise as above on and after July 22nd, 1926 and it is to continue in force thereafter until cancelled by either party giving the other thirty days notice in writing, such cancelment, however, not to prejudice any risk then pending.
8. This policy is to cover interest on all risks insured hereunder, such interest however, not to exceed at any one time $1,100,000.
9. In case of any loss, damage or misfortune, it shall be lawful and necessary to, and for the Assured, their factors, servants and assigns, to sue, labor, and travel for

in and about the defense, safeguard and recovery of the said goods and merchandise or any part thereof, without prejudice to this insurance; and to the charges whereof this insurance company will contribute on the basis of the proportionate interest hereby insured.

10. It is understood and agreed that in all cases where claim or claims against the assured are resisted by the assured with the consent and approval of this Company (but not otherwise), the costs and expenses of such resistance whether conducted by the assured or by this Company shall be paid by this Company on the basis of the proportionate interest hereby insured.
11. It is warranted by the assured that they will in no way consent to any act or agreement which shall in any way admit any liability in any matter connected with this insurance to the prejudice of these Assurers without the consent of these Assurers in writing.
12. It is warranted by the assured that declarations of all risks attaching under this policy will be made to R. F. Murray & Bros., Inc. for transmission to Underwriters once a month, but this policy shall not be vitiated by any inadvertent delay or omission in making declarations.
13. This form supersedes and takes the place of the printed form to which it is attached, the latter being hereby waived.
14. Attached to and forming part of policy No.
of Company.

Rate 1½%

REPORT AND ORDER OF THE COMMISSION.

(Filed and entered November 5, 1927.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 18672.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

Submitted July 14, 1927. Decided November 5, 1927.

Division of joint rates accorded the Hoboken Manufacturers' Railroad Company on silk from points on the Pacific coast to destinations on its line found unjust and unreasonable. Just and reasonable division prescribed.

E. B. Collins for complainant and Secretary of War, intervener.

Willis T. Pierson, Marion B. Pierce and *S. H. Gillette* for defendants.

James W. Carmalt for United States Testing Company, and *C. C. Habberstad* for Hoboken Chamber of Commerce, interveners.

REPORT OF THE COMMISSION.

DIVISION 1, COMMISSIONERS LEWIS, MCMANAMY, AND TAYLOR.

BY DIVISION 1:

Exceptions were filed by the parties to the report proposed by the Examiner, and the case was orally argued. Our conclusions differ from those recommended by him.

Complainant, Hoboken Manufacturers' Railroad Company, hereinafter called the Hoboken, a common carrier by railroad engaged in interstate commerce, by complaint filed August 6, 1926, alleges that the division of joint rates accorded to it on shipments of silk from points on the Pacific coast to destinations on its line is unjust and unreasonable. An increased division is sought.

The Hoboken is primarily a switching and terminal railroad located at Hoboken, N. J. Practically all of its revenues are derived from the performance of those services. Its operations extend over a distance of approximately one mile, exclusive of side and team tracks, from a point at Second Street to Eighteenth Street, where it has direct track connections and interchanges freight with the Erie Railroad Company. It also interchanges freight with other railroad companies through the Erie and over its own float bridge at Hoboken.

The silk under discussion moves in bales averaging approximately 133 pounds, in baggage cars in special solid trainloads at approximately passenger-train time. The line-haul carriers, in addition to insuring themselves against loss, provide armed guards to protect the shipments en route.

It moves at a transcontinental any-quantity rate of $9 per 100 pounds. The carriers east of Chicago, Ill., receive 27.5 per cent. of this rate or $2.475, which is approximately 175 per cent. of their first-class rate from Chicago to New York, N. Y. The Hoboken's division is 5.25 cents or the same as it ordinarily receives on less-than-carload freight.

When the silk arrives at the Erie connection notice is sent to the Hoboken. The Hoboken then clears its tracks and switches the silk to the warehouse of the United States Testing Company, hereinafter called the testing company, which is located at Fifteenth Street and Park Avenue, for unloading. After unloading, the empty cars are promptly returned to the Erie.

Special armed guards are employed to protect the silk from theft while it is on the Hoboken until it is unloaded. The unloading is performed for the Hoboken by the testing company in whose warehouse the silk is stored for the period of free time or forty-eight hours. Delivery to the consignees is made by the testing company upon the order of the Hoboken.

Complainant undertakes to show the necessity for the additional expenses incurred in the handling of these shipments over those required on ordinary less-than-carload traffic. The high value of the silk necessitates the employment of guards who receive $5 per day, or approximately 1.25 cents per 100 pounds. Complainant states that its warehouse is not adequate to store the silk nor is its labor sufficiently skilled to unload or otherwise handle it. For those reasons it is necessary to employ the testing company to unload, store and deliver the silk to consignees.

The value also increases the risk in handling and correspondingly increases the liability for loss. For protection against losses which may and do occur it is necessary to reinsure the value of the silk at a cost of 1.5 cents for each $100 in value or approximately 11.25 cents per 100 pounds. Complainant itemizes its total cost of handling this traffic as follows:

	Per car	Per ton	Per 100 pounds
		Cents	Cents
Switching [1]	14.93	74.65	3.73
Terminal insurance	45.00	225.00	11.25
Policing	5.00	25.00	1.25
Unloading and delivering	24.00	120.00	6.00
Total cost	88.93	[2] 444.65	22.23

[1] Based on cost of handling one car for year 1925.
[2] Cost based on loading of 40,000 pounds.

Complainant contends that its division should be not less than 25 cents per 100 pounds with a minimum of $25 per car. It insists that that division is reasonable, consid-

in and about the defense, safeguard and recovery of the said goods and merchandise or any part thereof, without prejudice to this insurance; and to the charges whereof this insurance company will contribute on the basis of the proportionate interest hereby insured.

10. It is understood and agreed that in all cases where claim or claims against the assured are resisted by the assured with the consent and approval of this Company (but not otherwise), the costs and expenses of such resistance whether conducted by the assured or by this Company shall be paid by this Company on the basis of the proportionate interest hereby insured.
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13. This form supersedes and takes the place of the printed form to which it is attached, the latter being hereby waived.
14. Attached to and forming part of policy No.
of Company.

Rate 1½%

REPORT AND ORDER OF THE COMMISSION.

(Filed and entered November 5, 1927.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 18672.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY

v.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.

Submitted July 14, 1927. Decided November 5, 1927.

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Willis T. Pierson, Marion B. Pierce and *S. H. Gillette* for defendants.

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DIVISION 1, COMMISSIONERS LEWIS, MCMANAMY, AND TAYLOR.

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Complainant undertakes to show the necessity for the additional expenses incurred in the handling of these shipments over those required on ordinary less-than-carload traffic. The high value of the silk necessitates the employment of guards who receive $5 per day, or approximately 1.25 cents per 100 pounds. Complainant states that its warehouse is not adequate to store the silk nor is its labor sufficiently skilled to unload or otherwise handle it. For those reasons it is necessary to employ the testing company to unload, store and deliver the silk to consignees.

The value also increases the risk in handling and correspondingly increases the liability for loss. For protection against losses which may and do occur it is necessary to reinsure the value of the silk at a cost of 1.5 cents for each $100 in value or approximately 11.25 cents per 100 pounds. Complainant itemizes its total cost of handling this traffic as follows:

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Total cost	88.93	[2] 444.65	22.23

[1] Based on cost of handling one car for year 1925.
[2] Cost based on loading of 40,000 pounds.

Complainant contends that its division should be not less than 25 cents per 100 pounds with a minimum of $25 per car. It insists that that division is reasonable, consid-

ering the cost to the trunk-line carriers of terminal service for deliveries to New York as follows:

	Per ton
Floating	$2.50
Unloading and delivery	1.20
Insurance	2.25
Policing	.25
Cost per ton	6.20
Cost per car of 40,000 pounds	124.00
Cost per 100 pounds	.31

Defendants contend that the switching costs as given by complainant are of no probative value, as they do not approximate the cost of the service. They state that as the average cost is determined by using the entire length of complainant's line it will not apply on this traffic which moves about two city blocks.

They show that the transcontinental insurance covers the silk for forty-eight hours after arrival at destination provided it is left in the cars. They contend therefore that there would be no necessity for terminal insurance if the silk were properly permitted to remain in the cars for that period. They state that the cost of policing is conjectural, speculative, and unjustified.

Defendants further contend that there is no obligation on complainant to employ the testing company to unload, store, and deliver the silk to consignees, and that the arrangement is economically unsound. They state that complainant should unload and store the silk in its warehouse with other less-than-carload freight and if that would not be practicable then to leave it in the cars under transcontinental insurance until delivery to consignees or else to deliver it to the testing company as agent of the consignees, thus relieving itself of all liability.

Defendants west of Chicago urge that if any increase should be granted in the division it should not be appor-

tioned to the lines west of Chicago, Peoria, St. Louis, and related gateways, explaining that the eastern carriers do not participate in the cost of terminal service on the Pacific coast. That request will not be granted.

The testing company and the Hoboken Chamber of Commerce appeared in support of complainant.

The costs of handling silk over that of handling other traffic are shown by complainant to be the cost of terminal insurance, policing, unloading, storing, and delivering. There can be no doubt of the increased risk in handling silk, and in the interest of efficient and economical operation the necessity for insurance and policing is obvious.

We find that on and since August 6, 1926, the division received by the Hoboken out of joint rates on silk from points on the Pacific coast to destinations upon its line was, is, and for the future will be unjust and unreasonable in that it was, is, and for the future may be less than 22 cents per 100 pounds.

An appropriate order will be entered.

ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 5th day of November, A. D. 1927.

No. 18672.

Hoboken Manufacturers' Railroad Company

v.

The Atchison, Topeka & Santa Fe Railway Company; The Baltimore & Ohio Railroad Company; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee & St. Paul Railway Company and H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago & North Western Railway Company; The Chicago, Rock Island & Pacific Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; The Delaware, Lackawanna & Western Railroad Company; Erie Railroad Company; Grand Trunk Railway System (Lines in United States, East of West Bank of Detroit and St. Clair Rivers) composed of Canadian National Railway Company, The Champlain & St. Lawrence Railroad Company (Canadian National Railway Company, Lessee), The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); Grand Trunk Railway System (Lines West of Detroit and St. Clair Rivers), composed of The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee), Cincinnati, Saginaw & Mackinaw Railroad Company (Canadian National Railway Company, Lessee), Detroit, Grand Haven & Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk-Milwaukee Car Ferry Company; The Michigan

Air Line Railway; Toledo, Saginaw & Muskegon Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; The Michigan Central Railroad Company; Missouri Pacific Railroad Company; The New York Central Railroad Company; The New York, Chicago & St. Louis Railroad Company; New York, Ontario & Western Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railway Company; and The Western Pacific Railroad Company.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant, at Hoboken, N. J., said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic.

It is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission.

By the commission.

(Seal) GEORGE B. MCGINTY,
Secretary.

ORDER OF THE COMMISSION FOR REHEARING.

(Filed May 14, 1928.)

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 14th day of May, A. D. 1928.

No. 18672.

Hoboken Manufacturers Railroad Company,
Complainant,

v.

The Atchison, Topeka & Santa Fe Railway Company, et al.,
Defendants.

Upon consideration of the record in the above-entitled proceeding, of petition of transcontinental and Western Trunk Lines for reargument, and of petition of defendants in central freight association and in trunk line territories for reargument and/or reconsideration and modification of the Commission's decision and order in this proceeding:

IT IS ORDERED, That this proceeding be, and it is hereby, reopened on the Commission's own motion for rehearing, at such time and place as the Commission may hereafter direct.

By the commission.

GEORGE B. MCGINTY,
(Seal) *Secretary.*

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

Docket No. 18672.

Hoboken Manufacturers Railroad Company,
Complainant,

v.

The Atchison, Topeka & Santa Fe Railway Company, et al.,
Defendants.

New York, N. Y., July 13, 1928,
10:00 o'clock A. M.

Before: J. E. SMITH and L. L. PROUT, Examiners.

Met pursuant to notice.

Appearances: PARKER MCCOLLESTER, Lord, Day & Lord, 25 Broadway, New York, N. Y., appearing for complainant.

MARION B. PIERCE, 50 Church Street, New York City, appearing for defendants in Official Classification territory.

H. G. TOLL, 300 West Adams Street, Chicago, Ill.; S. H. GILLETTE, 226 West Jackson Boulevard, Chicago, Ill., and ELMER WESTLAKE, 1211 Railway Exchange Bldg., Chicago, Ill., appearing for western carriers defendant, west of Chicago, Peoria, East St. Louis and similar gateways.

S. H. GILLETTE, 226 West Jackson Boulevard, Chicago, Ill., appearing for Chicago & Northwestern Railway Co.

L. D. HAWKINS, 154 Nassau Street, New York, N. Y., appearing for complainant.

PROCEEDINGS OF REHEARING BEFORE THE COMMISSION.

EXAMINER SMITH: The Commission has set for rehearing, and on its own motion, at this time and place, a complaint of the Hoboken Manufacturers Railroad Association against the Atchison, Topeka & Santa Fe Railway Company and others, Docket No. 18672.

This case was filed August 6, 1926, and under date of November 5, 1927, Division 1 of the Commission entered its report and order herein which, under date of the fourteenth of May, 1928, was reopened on the Commission's own motion for rehearing.

We are now here for such rehearing, and I shall ask counsel to enter their appearances verbally on the record at this time.

I think I know you all, but I will ask Mr. McCollester to tell me his name and the character in which he appears.

MR. MCCOLLESTER: Parker McCollester and Lord, Day & Lord, as attorneys for the complainant, and L. D. Hawkins, as traffic adviser to the complainant.

MR. WESTLAKE: H. G. Toll, S. H. Gillette, and Elmer Westlake, for the carriers west of the gateways of Chicago, Peoria, East St. Louis and other similar gateways.

MR. PIERCE: M. B. Pierce, for the lines in Official Classification territory defendants.

EXAMINER SMITH: And that covers all counsel.

Gentlemen, as I interpret the Commission's action in reopening this proceeding on its own motion for this rehearing, it is my duty to obtain such a clean, clear record, that even the wayfaring man—though an attorney—need not err therein, and, before all, is or is not this a case "where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission"?

I understand that the joint rate on silk from Pacific Coast points to Hoboken, N. J., $9 per 100 pounds, was not

so established; that it was, and is, a carrier-made rate; and that the Commission's jurisdiction is fully described and conferred in Section 15 of the Act, paragraph (6) thereof, in the following terms:

"(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers. . . . In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

If that be so, the report and order herein, 132 I. C. C. 579, 582, must be corrected to speak from the present and for the future——

MR. PIERCE: Is it appropriate to interrupt there?

EXAMINER SMITH: Yes, any time.

MR. PIERCE: What does that mean, "speak from the present"?

EXAMINER SMITH: I am willing to strike out "from the present." The reporter will so note.

To speak for the future—— .

MR. PIERCE: Well, sir, does not that mean that it can only speak as from the date of the Commission's order in this case?

EXAMINER SMITH: I am inclined to agree with you, Mr. Pierce. I am inclined to agree with you.

They cannot speak as of and from August 6, 1926, or "for the period subsequent to the filing of the complaint or petition or the making of the order of investigation"; for such a report and order can issue only "in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission," as prescribed in that part of paragraph (6) omitted from the above quotation.

The record, as it stands, seems reasonably clear; and, if we can agree concerning what it shows, our labors here ought to be reduced. Let me see if it be possible to state in the record now certain facts to which all parties will agree. (The paging noted is that of the transcript of the former hearing.)

1. The traffic is raw silk (or mainly raw silk) imported from the Orient through Pacific Coast terminals, and moving thence all-rail to New York harbor destinations. Here the destination is in Hoboken, N. J., on, and served only by, complainant, the Hoboken Manufacturers Railroad Company. I hear no objection to that.

2. For this movement the joint rate is $9.00 per 100 pounds, carloads and less carloads, or any quantity. (Page 157.) In the publication of this rate complainant and defendants concur. (Pages 9 and 99.)

Any objection to that?

MR. PIERCE: Is it understood, sir, that this is a rate which was not established pursuant to a finding or order

of the Commission? You refer to that in the prior part of your statement.

EXAMINER SMITH: Yes, that applies all the way through.

MR. MCCOLLESTER: We agree that is so. I have a comment to make on your statement as to the time from which the findings or order of the Commission will apply, but I was saving that until afterward, if that is all right with you.

EXAMINER SMITH: Any way that suits counsel here, and that will tend towards getting the case clear. Somebody has got to write this record, you know.

MR. PIERCE: Let us clean up as we go along.

EXAMINER SMITH: As far as possible.

MR. MCCOLLESTER: I have this to say, that so far as the first part of the Examiner's remarks are concerned, we agreed that under the decision in the Brimstone case, that part of the order which states that this order will take effect as of August 6, 1926, is invalid. We do not understand that the Commission's order of the fourteenth of May, reopening the case for further hearing, had the effect of setting aside its order, insofar as the order was valid and, therefore, we take the position that if the Commission, on rehearing, shall determine that its previous findings are correct and justified by the record there made, or by the record there made as supplemented by the record here, and shall affirm its order, its order may speak from the fifth of November, 1927.

EXAMINER SMITH: I think you have yourself very plainly on the record, and I think Brother Pierce understands it.

MR. WESTLAKE: With that position we do not agree, however.

EXAMINER SMITH: Well, gentlemen, we will find out where we are anyway.

Now, 3. The commodity (raw silk, or/and allied articles taking the raw silk rate) is of high value; the approximate average given in the record being about $6 per pound. (Complaint, paragraph VI, page 53 and elsewhere.)

I hear no objection to these paragraphs, and unless objection be raised, they will be accepted as stipulated facts.

MR. WESTLAKE: May it please the Examiner, I haven't had an opportunity to read this. I would like to ask this indulgence on the part of the Examiner, that after you have concluded reading it, that sometime before the close of the hearing, if I wish to register any objection, I may do so.

EXAMINER SMITH: Yes, and that applies to all counsel. There is no attempt here to catch anybody by technicality, but we merely want a clear record.

4. Generally speaking, owners, consignors and consignees, do not load or route the shipments. The loading and routing are attended to by the ocean carriers in conjunction with the rail carriers for the best interests and protection of all parties, particularly: Protection of the property, safety, and speed of transportation. (Page 68.)

5. Although the rates apply on any quantity, the value of the commodity considered, $6 per pound, and the necessity for special handling borne in mind, this traffic ordinarily is moved in baggage, or other strong, good cars, sealed, and provided with armed guards for the entire journey; and the average weight loaded per car approximates 40,000 pounds.

MR. PIERCE: Mr. Examiner, I think the record is that it is always moved in baggage or express cars. There is an intimation there it might be moved in a box car. Such is not this record.

EXAMINER SMITH: I thank you again. That is exactly what I want.

MR. MCCOLLESTER: I think that is not exactly so. I think it moves in baggage cars or cars that are capable of movement at passenger train speed, but I think it does sometimes come in box cars.

EXAMINER SMITH: It is not very important. We will agree they use good cars.

MR. WESTLAKE: May it be stipulated that this traffic moves in passenger trains?

MR. MCCOLLESTER: No, we won't agree to that.

MR. WESTLAKE: I am afraid we will have to prove it then.

MR. MCCOLLESTER: Mr. Examiner, on that point I think that your statement should also show, where you show the average weight loaded per car approximates 40,000 pounds, that the shipments were less than carload shipments.

EXAMINER SMITH: I have already said that.

MR. MCCOLLESTER: You have said they move at any quantity rates, but each car contains shipments for several consignees. All right, excuse me.

EXAMINER SMITH: You do not need any excuse. I want the record. I want what you all contend.

6. As this traffic is worth approximately $240,000 per car; the interest on which, at 6 per cent., is at the rate of about $40 per day, the demands of carriers and importers are for safety and speed in transportation.

7. These demands result in:

(a) Transportation on express or passenger time schedules.

(b) The carriers providing every safeguard known to them, including reinsurance to indemnify them.

(c) This reinsurance—here called transcontinental insurance—in so far as we are interested in this proceeding, provides as follows:

"In case of shipments to points of destinations other than New York, this insurance shall terminate immediately upon discharge from railroad car at point of destination. If the car is not discharged within 48 hours after its arrival, the assured will notify the insurance company and pay additional premium thereon if required." (Page 143.)

May it not be possible to agree also, that:

8. Owing to the extra care taken by all parties, especially the carriers, loss and damage claims on this traffic are relatively small.

9. The shipments carry transcontinental insurance (which may be called carrier reinsurance) while in transit and while in car on terminal line prior to delivery—certainly for forty-eight hours if and while in car after arrival at destination.

MR. PIERCE: Should not that be prior to delivery or unloading?

EXAMINER SMITH: In car—looks to me like the equivalent to your unloading, but I accept your amendment.

MR. MCCOLLESTER: Yes, I think that is correct, because I think that the transcontinental insurance does not cover while the silk is in our possession prior to delivery.

MR. PIERCE: While it is in your possession after it has been unloaded.

MR. MCCOLLESTER: After unloading from the car, but prior to delivery.

EXAMINER SMITH: That is all right. I have "in car," here, which I take to be the same as your unloading.

MR. MCCOLLESTER: While in car, I guess that covers it.

EXAMINER SMITH: 10. "Discharge from railroad car at the point of destination other than New York" terminates the transcontinental insurance. And, here, there may be two questions to be asked:

X. Is Hoboken, New Jersey, a point "of destination other than New York"?

Y. Does, or does not, the phrase "discharge from railroad car" mean mere unloading without reference to whether or not delivery be accomplished?

Now, in addition to the matters set forth above, are not these things also true?

11. No shipment of this traffic is consigned to the United States Testing Company, Inc.? But all shipments with which we have to do here are billed care of "Hoboken Manufacturers Railroad Company," or for "Hoboken Manufacturers Railroad" for delivery.

12. The complainant, the Hoboken Manufacturers Railroad Company, operates a short terminal, or delivery and originating railroad, in the City of Hoboken. This company is a common carrier, incorporated under the laws of the State of New Jersey, and is now privately owned? Is that agreed to?

13. For the handling of this traffic, mainly raw silk, at Hoboken, complainant has made the intervener, the U. S. Testing Company, its agent for the receipt and discharge of all shipments handled by complainant; and has, thereby, made the warehouse of the U. S. Testing Company complainant's depot, station, and warehouse for the receipt of such traffic——

Mr. Pierce: Now, Mr. Examiner, I think that should be limited to a statement that they have made some portion or portions of it. As I recall, that is put right over here (indicating), we will say, and held there for forty-eight hours, and when our liability ceases it is moved over here (indicating).

Examiner Smith: I have got all of that, if you will just watch me.

Mr. Pierce: All right, sir.

Mr. McCollester: I think the Examiner's statement is correct.

EXAMINER SMITH: —for holding such traffic for complainant, subject to all lawful demands of the owners thereof during the period of forty-eight hours; and, thereafter, for warehousing the same for and in behalf of complainant until and unless the owners of such traffic shall have taken possession thereof from complainant.

I will give you a chance to straighten that out, either now or later.

MR. PIERCE: I think that carries the implication that the entire warehouse is made the——

EXAMINER SMITH: No, Brother Pierce, you say the entire warehouse is not so used and I will agree with you that the record shows it is not so used. The present record is clear on that point, and if I have failed to be clear, I deserve correction, and I will thank you for it.

14. The U. S. Testing Company also acts as agent for owners of this traffic; but such agency for owners becomes effective only upon the notification and order of complainant. (Pages 70, 73, 75.)

15. The complainant, the Hoboken Manufacturers Railroad Company, is in full possession of this traffic as a terminal delivering carrier from the moment the cars are switched to it by the Erie Railroad until the shipments are delivered by it to the lawful owners thereof. Legal questions concerning agency have no bearing here; for this traffic is in the possession of the Hoboken Manufacturers Railroad Company, so far as this proceeding is concerned, until the Hoboken Manufacturers Railroad Company delivers it to the lawful owner.

And I might add thereto "or agent of said lawful owner."

Here arise the questions in this proceeding.

Q. Defendants allow complainant certain amounts out of the joint rates on this traffic for its services. These amounts complainant alleges are not sufficient for the serv-

ices actually performed. The Commission found as follows:

"We find that on and since August 6, 1926, the division received by the Hoboken out of joint rates on silk from points on the Pacific Coast to destinations upon its line was, is, and for the future will be unjust and unreasonable in that it was, is, and for the future may be less than 22 cents per 100 pounds."

That finding, by virtue of the order of May 14, 1928, is open for all purposes.

MR. MCCOLLESTER: We agree to that, so long as there is no inference that the order of May 14th operates to set aside the previous order.

EXAMINER SMITH: That is to say:

(a) As to the fact of present sufficiency or insufficiency of division;

(b) And as to the measure of the proper division for the future only.

MR. PIERCE: Unless there be no mistake made, Mr. Examiner, it is the position of the lines east of Chicago that the order of May 14th does set aside the prior order.

EXAMINER SMITH: We have it perfectly plain on the record now. You see, I don't have to decide that.

MR. MCCOLLESTER: Mr. Examiner, I am not sure that I go along with your statement—your addenda here, "for the future only." We will agree with you if that is limited for the future after the date of the previous order.

EXAMINER SMITH: I think your position is perfectly plain.

MR. WESTLAKE: I wish to express my concurrence with Mr. Pierce's views as to the fact that there is no order in effect in this case today.

EXAMINER SMITH: R. Again. In its report in this case, 132 I. C. C. 579, on page 581 thereof, the Commission said:

"Defendants west of Chicago urge that if any increase should be granted in the division, it should not be apportioned to the lines west of Chicago, Peoria, St. Louis, and related gateways, explaining that the eastern carriers do not participate in the cost of terminal service on the Pacific Coast. That request will not be granted."

MR. WESTLAKE: I think, Mr. Examiner, that the use of the word "not" in that last sentence was entirely inadvertent on the part of the Commission.

EXAMINER SMITH: For the Commission I thank you.

And the order herein, November 5, 1927, which made that report a part thereof, is in these terms:

"It is ordered, that of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant, at Hoboken, N. J., said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic."

The record shows:

1. The defendants named do participate in the joint rates and through transportation.

2. The Commission was fully advised as to present divisions of transcontinental rates.

MR. WESTLAKE: I think we will probably have to take some exception to that, but I think we are going to advise you a little more fully with respect to certain practices on the west coast.

EXAMINER SMITH: 3. No issue here raised touches the method of dividing transcontinental joint rates as between what are known as western lines and eastern lines.

MR. PIERCE: Let me get clear on that. Does that mean that there is no question here as to whether or not all of

the defendants shall participate in any division to be awarded to the complainant, or does it only mean that there is no question here as to whether the Erie, for instance, shall bear 40 per cent. and the Santa Fe 60?

EXAMINER SMITH: Mr. Pierce, I think I understand you, and I am tolerably certain you understand me. The issue in this case is not as to divisions east and west of Chicago, Peoria, and so on. That is not the issue. The sole issue here is the allowance, or division, or compensation, or whatever you choose to call it, paid out of the total rate to the Hoboken Manufacturers Railroad Company.

MR. PIERCE: By all of the defendants.

EXAMINER SMITH: I will grant you that, sir, if you want to put it that way. Now, I am going to come back at you. You have got it that way to suit yourself now, but there is no issue as to divisions east and west of Chicago.

MR. PIERCE: As between the defendants.

EXAMINER SMITH: As between the defendants. We do not know it, excepting that it is in the record.

MR. PIERCE: I agree with that.

EXAMINER SMITH: And, therefore, the Commission's order, insofar as the clause underscored above is concerned, would comply with the law and accomplish all that was necessary had it read (or if it were changed to read) as follows:

"Which division shall be apportioned among the defendants, accordingly as they participate in the revenues derived from this traffic, without disturbing major divisions between what are known as western lines and eastern lines as they now exist by virtue of contract between the carriers and as established by long usage."

Does that suit you?

MR. WESTLAKE: Perfectly.

EXAMINER SMITH: 5. It is clear that at present what are known as western lines are not directly concerned with the terminal divisions accorded by eastern lines to complainant or other delivering carriers——

MR. PIERCE: I except to that.

EXAMINER SMITH: —it is also clear that under the complaint as drawn, the Commission was justified in making its order run against all defendants, without examining quotas west and east of Chicago, or other major division points; and, it would seem to follow that the defendants should stipulate the correctness of the facts already of record (and not contested by eastern lines) and that the paragraph on page 581 should be corrected by cancelling the last sentence thereof; to wit, by striking out the words "That request will not be granted," and by substituting in place thereof the following:

"But, the major divisions of transcontinental rates on this traffic are not in issue here and all we are at present concerned with are the terminal divisions, or allowances, out of the joint rates on silk, which are, and shall be apportioned to this complainant. That being the status of this case, our order shall run against all defendants, and they shall all be required to obey it. Such an order is warranted by the pleadings; and its interpretation should be made in good faith as between the carriers east and west of Chicago. If the eastern lines should depart from the present established practice with respect to divisions as between them and their western connections in the major apportionment of transcontinental rates on silk, that matter on proper presentation by the western lines may be brought to our attention. For the present, however, neither complainant nor we are concerned with how such major eastern and western divisions may be made."

MR. PIERCE: If you will strike out from "such an order" on to the end of the quoted paragraph, I won't take exception to it.

EXAMINER SMITH: Mr. Pierce concurs with the suggested change beginning with the word "but" running down——

MR. PIERCE: "They shall all be required to obey it."

EXAMINER SMITH: —eight lines and ending with the words "obey it." He excepts and asks that all following the words "obey it" be stricken out. That is, "such an order" down to the last line "divisions may be made."

MR. PIERCE: Of course, I have no objection to the statement "such an order." I just stopped at the first convenient period.

EXAMINER SMITH: All right, sir. I understand Mr. McCollester concurs in that and that Mr. Westlake has no objection.

MR. MCCOLLESTER: I concur in your statement.

MR. WESTLAKE: I see none so far.

EXAMINER SMITH: In and to the extent now shown by your agreements, or exceptions, to the above statements made by me, the record ought to be nearly clear. As I see our work for the day—and this, gentlemen, is not to limit your procedure—merely my guess—we may direct our attention to:

"The matters required by the act; and then to the measure of the divisions to be accorded complainant. The Commission has said 22 cents; the carriers, east of Chicago, now pay 5¼ cents; and, the case having been reopened, complainant's demand is 25 cents, with a minimum allowance of $25 per car—concurred in by Mr. McCollester.

MR. WESTLAKE: Is this something new, or is this what was contained in the original complaint, this 25 cents with a minimum amount of $25 per car?

MR. MCCOLLESTER: The complaint was amended at the hearing with respect to that prayer, 25 cents minimum, $25 per car. That is correct, is it not?

MR. PIERCE: Yes, sir.

EXAMINER SMITH: Evidence under the subject of quantum of division to complainant is obviously in order. Other matters are, perhaps, questions of law; or they may have been covered in the facts already conceded.

You may proceed.

MR. MCCOLLESTER: First, Mr. Examiner, with respect to your statement there at the very last, that the case having been reopened, complainant's demand is for 25 cents with minimum allowance of $25 per car, that was the complainant's request at the original hearing. The Commission did not go along with them to the full extent, and gave them only 22 cents. We take the position, as I have already stated, that the previous order is still in effect, and we will be satisfied, and we ask that that order be continued in effect, but if the decision goes against us on that question of whether that order is still in effect or not, then we revert to our original position and ask that any new order shall be in the amount of 25 cents or a minimum of $25 per car. In other words, we would rather get the old order and have it date from November 4, 1927, but if we can't do that, we want the larger amount.

EXAMINER SMITH: Are there any other exceptions or modifications to enter at this time?

MR. MCCOLLESTER: I have just one, Mr. Examiner, with reference to your statement that the average given in the record was about $6 per pound. I think it might be well to—I think your statement is correct, but just to state that that was an average as of the period of course covered by the record, and we are prepared to show that the average fluctuates, and that the maximum value which measures after all the maximum responsibility of all parties often exceeds that amount.

EXAMINER SMITH: All right, sir.

Now, gentlemen, if that is all for the present, you may proceed.

Gentlemen, if any of you desire to refer to the Brimstone case, I have the official copy of that record, marked, if you desire to quote.

GEORGE H. HOBBS was thereupon called as a witness, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MCCOLLESTER:

Q. What is your full name, please?

A. George H. Hobbs.

Q. And what is your connection with the Hoboken Manufacturers' Railroad?

A. Secretary and treasurer.

Q. How long have you been connected with that railroad?

A. Thirty years, January 1st.

Q. And you are personally familiar with its operations, and the way it handles general freight and silk?

A. Yes, sir.

Q. I show you a blueprint, and ask you if that correctly sets forth the northern end of the Hoboken Manufacturers' Railroad tracks, and shows the location of the U. S. Testing Company with reference to those tracks?

A. Yes, sir.

MR. MCCOLLESTER: We offer this, Mr. Examiner, as Exhibit No. 9.

EXAMINER SMITH: It will be received and so marked, at this time.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 9, Witness Hobbs," and is forwarded herewith.)

Q. Just looking at this blueprint a moment, the interchange with the Erie Railroad is located where?

A. At 19th Street.

Q. And can you describe from the blueprint where that is—how it is shown? It is at the upper right hand end of the blueprint, is it?

A. Yes, sir.

EXAMINER SMITH: Under the arrow?

THE WITNESS: Yes, sir.

MR. MCCOLLESTER: Yes, under the left-hand end of the arrow.

By MR. MCCOLLESTER:

Q. The tracks of the Hoboken Manufacturers' begin at that point, is that correct?

A. Yes, sir.

Q. And the tracks, running diagonally across the corner, are the tracks of what railroad?

A. The Erie Railroad, Weehawken branch, and Jersey Junction division of the New York Central.

Q. The lead into the plant of the U. S. Testing Company is illustrated, is it not, by that line running from the curve of the Hoboken tracks to the square marked U. S. Testing Company?

A. Yes, sir.

Q. In order to get into the U. S. Testing Company, you have to cross two tracks, do you?

A. Yes, sir.

Q. Can you describe on the blueprint the location of your float bridges?

A. We should number these, should we not?

Q. Yes, they should have been numbered.

A. It is hard to describe exactly where it is. It is at the center of the—at the end of the tracks.

Q. Will you take the record copy and mark on that with the letter "A" where the float bridges are located?

A. Yes, sir (witness marks).

Q. Will you mark the interchange with the Erie Railroad, letter "B"?

A. Yes, sir (witness marks).

Q. Mr. Hobbs, are your railroad facilities, tracks and buildings, substantially the same now that they were in 1926?

A. Physically, absolutely; yes, the same.

Q. Are your operations, so far as the handling of freight is concerned, substantially the same as they were in 1926?

A. Yes, sir.

Q. Do you receive more silk at your float bridge than you did in 1926?

A. Yes, sir; we do.

Q. At the previous hearing it was testified that your freight house was not suitable for the storage and delivery of less than carload shipments of silk. Is that still correct at the present time?

A. Absolutely true.

Q. Is it possible for you to purchase freight house facilities of your own at the present time?

A. No, sir; not for silk.

Q. I show you a copy of a letter—we have the original here if you want to see it—and ask you if that is a copy of the letter written by the Hoboken Manufacturers' Railroad to the U. S. Testing Company, outlining the arrangement between them for the handling of silk, this letter being dated May 4, 1926?

A. It is; yes, sir.

MR. MCCOLLESTER: We offer this copy in evidence. We have the original here if anybody wants to see it.

MR. WESTLAKE: Is there a reply to it by the U. S. Testing Company?

MR. MCCOLLESTER: At the bottom of the letter it is signed "Approved and Accepted."

EXAMINER SMITH: That will be received and marked Complainant's Exhibit 10.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 10, Witness Hobbs," and is forwarded herewith.)

Q. I understand you testify that your operations in handling silk as covered by this letter are the same now as they were in 1926?

A. Absolutely the same.

Q. Except with the greater tonnage handled from your car floats?

A. Yes, sir.

Q. The U. S. Testing Company continues to act as your agent, does it?

A. Just the same as in the previous hearing.

Q. And there has been no change in the arrangement between you and the testing company?

A. None whatever.

Q. At the previous hearing it was testified that the reason that you employed the U. S. Testing Company as your agent, was the lack of sufficient and proper facilities and freight station facilities for the handling and delivery of silk. That situation still obtains, does it not?

A. Yes, sir, that is true.

Q. Have you made, or had made under your supervision, an examination of your costs in switching at the present time?

A. Why, it is the same as——

Q. Just answer the question. Have you had such an examination made?

A. No, sir—sure, we had one made.

Q. What did that investigation show as to how your switching costs at the present time compare with the switching costs testified to at the previous hearing?

A. Practically the same thing.

Q. Do you handle more silk now than you did previously?

A. It is running about the same.

Q. Does the switching from your float bridge involve somewhat more expensive service than switching from the interchange track?

A. Very much more.

Q. Will you just state why that should be, what difficulties are encountered which should increase that cost?

A. It is a well-known fact that it costs more money to pull cars from a float bridge than it does from an interchange. Further, owing to the peculiar situation of our float bridge, there is a curve entering to it, and there is about a two per cent. grade.

MR. WESTLAKE: To or from it?

THE WITNESS: Two per cent. grade from it.

By MR. MCCOLLESTER:

Q. That is, you have to pull up a two per cent. grade from the float bridge?

A. Yes, sir.

MR. WESTLAKE: Is it descending or ascending?

THE WITNESS: Depends on whether you are putting the cars on or taking them from the float.

Q. Taking them from the float you enter the grade?

A. You go uphill, yes, sir.

Q. Is that grade on the curve which appears in the tracks just back of the float bridge, as shown on the blueprint?

A. It starts at the float bridge itself, at the water line, and goes back beyond the curve shown on this blueprint. The entire curve there is the grade.

Q. At the previous hearing it was testified that the greater proportion of your freight, handled in switching

service, was delivered to or received from deliveries at the north end of your line, in the vicinity of the U. S. Testing Company. Is that situation true at the present time?

A. It has a tendency to more come over the float bridge all the time. The railroads appear to favor that delivery to us, particularly the ones that have not got a direct connection with us.

Q. Perhaps you did not understand my question, although I am glad to have that answered. At the previous hearing it was testified that most of the consignees and shippers served by you are located on the north end of your line. Is that still true?

A. Yes, sir.

Q. Has the proportion of the tonnage to and from the north end of your line, as compared to that to and from the south end of your line, increased since 1926?

A. Increased very much on the northern end.

EXAMINER SMITH: I did not get that prefix there?

THE WITNESS: It increased.

By MR. MCCOLLESTER:

Q. And averaging in all that tonnage, your testimony is that the switching cost is approximately the same as that testified to at the previous hearing; is that correct?

A. Practically the same.

Q. Is your policing handled in the same manner as it was at the time of the previous hearing?

A. Identically the same.

Q. Does the U. S. Testing Company render you bills, they acting as your agent, on the same basis as they rendered such bills in 1926?

A. Yes, sir, they do.

Q. Mr. Hobbs, I show you a statement headed "Revised book value as of December 31, 1927," and ask you if that was prepared under your supervision and at your direction?

A. Yes, sir.

Q. Is it correct to the best of your knowledge?

A. To the best of my knowledge and belief, yes, sir.

MR. MCCOLLESTER: We offer that as Exhibit No. 11, Mr. Examiner.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 11.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 11, Witness Hobbs," and is forwarded herewith.)

MR. MCCOLLESTER: I will say, Mr. Examiner, and friends on the other side——

EXAMINER SMITH: Gentlemen, there are two of us here.

MR. MCCOLLESTER: Messrs. Examiners—excuse me. I started to say that the man who actually compiled these figures is here, and if Mr. Hobbs cannot answer any questions about it, the man that actually made the figures under Mr. Hobbs' direction is available, for questioning.

By MR. MCCOLLESTER:

Q. Mr. Hobbs, the figures shown here under the column "Original Valuation," were determined by whom?

A. Mr. Spencer, of the Interstate Commerce Commission.

Q. And for what purpose?

A. For the purpose, I presume, of purchasing the property.

Q. Were they determined by him at the time the United States Government was considering purchasing the Hoboken Manufacturers Railroad?

A. Yes, sir.

Q. And were those the figures on the basis of which the United States Government made its purchase?

A. Yes, sir.

Q. Have you set those figures up on your books and carried them since that time as the original valuation of the property?

A. Yes, sir.

Q. I show you a sheet headed depreciation 1927, and ask you if that was prepared under your supervision and at your direction, and if it is correct?

A. It was, yes, sir, and it is correct to the best of my knowledge and belief.

MR. MCCOLLESTER: We offer that as Exhibit No. 12, Mr. Examiner.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 12.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 12, Witness Hobbs," and is forwarded herewith.)

Q. This is simply for the purpose of showing how the depreciation figures appearing on the previous exhibit, were worked out. I will show you, and offer at this time, simply for identification, and will have a witness to testify to it, but may I offer it for the record, to be properly authenticated later, a statement headed "Appraisal of all lands held by the Hoboken Manufacturers Railroad."

I offer this now, because the values shown there are taken into the previous statements.

(The same was thereupon received, and marked "Complainant's Exhibit No. 13, Witness Hobbs," for identification.)

Q. Now I show you a statement which has no heading, but the first item on it is appraised value of land, which

statement shows total valuation of $2,152,611.17, and ask you if that was prepared under your direction, based upon the figures contained in the exhibits previously offered?

A. Yes, sir.

Q. And it is correct to the best of your knowledge?

A. Yes, sir.

MR. MCCOLLESTER: We offer that as Exhibit No. 14, Mr. Examiner.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 14.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 14, Witness Hobbs," and is forwarded herewith.)

Q. It appears from this exhibit, does it not, that based upon the present appraised value of land and the book value of road and equipment, the total valuation of the Hoboken Manufacturers Railroad Company is $2,152,611.17.

A. Yes, sir.

Q. And that to earn 5¾ per cent. on its valuation, it requires a net income of $123,755.14?

A. That is right?

Q. Now I show you a statement, headed "Statement of operations, July 1, 1927 to May 31, 1928, inclusive," and ask you if that was prepared under your supervision and if it is correct?

A. It is, and is correct.

MR. MCCOLLESTER: We offer this as Exhibit No. 15, Mr. Examiner.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 15.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 15, Witness Hobbs," and is forwarded herewith.)

Q. Looking at this, Mr. Hobbs, it is my understanding that your figures have been compiled only up to the 31st of May, 1928, is that correct?

A. Yes, sir.

Q. But you have shown on here, in order to round out a full year from July 1st to July 1st, an estimated net income for 1928, based upon an average and on your experience?

A. Yes, sir.

Q. What is the basis of the figures shown in the top half of this exhibit? How do they differ from the figures shown in the lower half?

A. Well, the top shows—includes silk, and the lower part excluding silk.

Q. Well, is it correct that the top half shows what you would have earned if you had received, or what you will earn if you do receive the divisions prescribed by the Commission, commencing on November 1, 1927?

A. That was the intention of the statement to show the difference between what we have got and——

Q. And what you would have without this increase?

A. Without the increase.

Mr. McCollester: I direct your attention, Mr. Examiners, to the fact that even with the divisions prescribed by the Commission in that order, the net income of the Hoboken is only $26,000 for the year ending June, 1928.

Examiner Smith: Let me see if we cannot get something in the record right now. There is a reference in the prior record to a composition between the Hoboken Manufacturers Railroad Company and the other carriers as to divisions on other commodities—classes and commodities [other] than silk, not involved here, but the record indicates that that composition and agreement has been reached, and I want to know if

the divisions on other classes and commodities are now published.

MR. MCCOLLESTER: They are now in effect.

EXAMINER SMITH: But not published?

MR. MCCOLLESTER: I suppose they are filed with the Interstate Commerce Commission. I don't know whether——

EXAMINER SMITH: How long have they been in effect?

MR. PIERCE: On trunk line traffic since January 1, 1927, and on the other since June 1, 1927.

EXAMINER SMITH: And these figures would reflect the effect of the new divisions?

MR. MCCOLLESTER: That is correct, is it not, Mr. Hobbs?

THE WITNESS: Yes, sir.

MR. WESTLAKE: I should like to ask for the record what carriers are parties to this composition. You can describe that generally, Mr. McCollester, if you will.

MR. MCCOLLESTER: There are immediate connections——

MR. WESTLAKE: They do not embrace carriers west of Chicago, East St. Louis, Peoria, and so forth?

MR. MCCOLLESTER: As to that I do not know. I do not know what carriers west of Chicago may—what portion of this increase they may bear or not. Does that satisfy you?

MR. WESTLAKE: No, it does not, because I think you are quite well aware that those compositions were between the so-called eastern carriers and your own peo-

ple. I think you ought to be willing to stipulate that fact, because it is a fact.

Mr. McCollester: All I know about it is that the negotiations are with our immediate connections, and what they did beyond that I do not know, and I am not going to stipulate anything beyond that.

Mr. Westlake: However, you have no agreement with the carriers west of those gateways which I have enumerated, have you?

Mr. McCollester: We have an agreement for the division of all rates, including joint rates from the Pacific Coast. That agreement was made with our immediate connections participating in those rates. Whether they acted as agents also for other western connections, I do not know. I know that we made our agreement with our immediate connections. We are concerned only with our primary division of the joint rates.

Mr. Westlake: That is satisfactory.

Mr. McCollester: I think that is all. You may cross-examine.

Cross-Examination.

By Mr. Pierce:

Q. Was the Hoboken Manufacturers Railroad or the stock of the Hoboken Manufacturers Railroad Company recently sold?

A. It was.

Q. To whom?

Mr. McCollester: I object, Mr. Examiner. I thought we had stipulated that it is now privately owned. I think that is sufficient for the record.

Mr. Pierce: It is not sufficient to test this Exhibit 14.

MR. MCCOLLESTER: I do not see that the question has any bearing on Exhibit 14.

MR. PIERCE: Well, you have attempted to prove a total valuation here, and we want to see whether or not you received anything like that for the property when it was sold.

MR. MCCOLLESTER: You may ask him that question. If he knows, he will tell you. As a matter of fact you know the property was not sold. I don't mind stating that there has been no sale of the property. The U. S. Government bought the stock. The U. S. Government has sold the stock, and the property is owned by the corporation.

MR. PIERCE: How much did the U. S. Government sell the stock for and to whom?

MR. MCCOLLESTER: That I don't know.

MR. PIERCE: Could you state, Mr. Hobbs?

THE WITNESS: No, sir, the stock was sold by Col. E. D. Peek, representing the Secretary of War to William L. Diener.

MR. PIERCE: Is Mr. Diener a railroad operator?

THE WITNESS: No, sir, I don't think he is.

MR. PIERCE: What is his business, if you know?

THE WITNESS: I am not familiar with it.

MR. PIERCE: That is all.

EXAMINER SMITH: Any other questions?

(No response.)

(Witness excused.)

MR. MCCOLLESTER: I will call Mr. Burhorn.

C. ALFRED BURHORN were thereupon called as a witness, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MCCOLLESTER:

Q. What is your occupation, Mr. Burhorn?

A. I am in the real estate business in Hoboken.

Q. Will you briefly outline your experience in the real estate business?

A. I reside at No. 65 Tenth Street, Hoboken. I am the president of C. Alfred Burhorn Company, real estate and insurance agency, with office at No. 1 Newark Street, Hoboken, established in 1903, and since that time have bought, sold and rented all classes of real estate, improved and unimproved, throughout that section of Hudson County lying between the Hackensack River and the Hudson River, also negotiating mortgage loans.

I have been employed by banks, legal firms, out of town real estate brokers and other business concerns to appraise lands and buildings.

Have acted as appraiser for lands and buildings required by the New Jersey State Highway Commission for the right of way for the highway leading from the Holland Vehicular Tunnel from Jersey Avenue to the Lincoln Highway, Jersey City.

Have made appraisals for the North Jersey Transit Commission for certain of their suggested transit plans.

On behalf of the Hudson County Board of Freeholders have testified as expert in condemnation proceedings, and have also acted on numerous occasions as Supreme Court Commissioner in condemnation matters, notably the site for the Hudson County Insane Asylum in Secaucus, the so-called Suckley Park Tract, partly in the former town of West Hoboken and partly in Jersey City, which was acquired by the Hudson County Park Commission; Hudson County Jail site in Jersey City.

About ten years ago appeared as expert in behalf of the United States War Department before the Arbitration Board in the Shore Road matter.

Have also prepared evidence and testified in tax appeals before the County and State Boards of Taxation.

Director of Hoboken Building and Loan Association.

In association with Edward McDermott, of Union City, am at present engaged in making appraisals of properties for the mortgage loan department of the Prudential Insurance Company of Newark.

President of the Real Estate Board of Hoboken, one of the constituent local boards of the National Association of Real Estate Boards, and have served two terms as president of the Real Estate Board of Hudson County.

Non-resident member of the Real Estate Board of New York.

Q. Were you retained, Mr. Burhorn, by the Hoboken Manufacturers Railroad Company to make an appraisal of the real estate owned by it and leased by it?

A. Yes, sir.

Q. I show you copy of Exhibit No. 13, and ask if the values of the various parcels of real estate shown thereon, are the values which you arrived at as the result of that appraisal?

A. They are, yes, sir. I have copies of them here.

MR. MCCOLLESTER: We offer Exhibit 13 for identification in evidence.

EXAMINER SMITH: Exhibit 13 for identification, will be received in evidence and marked.

("Complainant's Exhibit No. 13, Witness Hobbs," for identification, was thereupon received in evidence, marked and is forwarded herewith.)

Q. And those values, are they the correct and fair market values of the properties thereon shown, to the best of your opinion as a real estate expert?

A. They are.

MR. MCCOLLESTER: You may cross-examine.

MR. WESTLAKE: No cross.

MR. MCCOLLESTER: Apparently no questions, Mr. Burhorn. They take you at your word.

EXAMINER SMITH: You are excused.

(Witness excused.)

EDWARD C. BROWN, was thereupon recalled, and being previously sworn, further testified as follows:

DIRECT EXAMINATION.

By MR. MCCOLLESTER:

Q. You are connected, as you testified at the previous hearing, with the U S. Testing Company, are you?

A. I am.

Q. Are your duties with that company the same now as those to which you testified at the previous hearing?

A. They are.

Q. Are the operations of the testing company, as agent of the Hoboken Manufacturers Railroad Company, the same now that they were in 1926, and as previously testified to by you?

A. Identically the same.

Q. Do you render bills to the Hoboken Manufacturers Railroad Company for your services on the same basis as you were rendering bills at that time?

A. Exactly.

Q. What proportion, can you estimate, of the shipments of silk received by you as agent for the Hoboken Manufacturers, are held for the full period of the forty-eight hours free time? Can you give any estimate of that?

A. My best judgment would be about 80 per cent.

Q. I show you a statement showing the dates and number of bales of raw silk received by the U. S. Testing Company, Inc., for the risk and account of the Hoboken Manufacturers Railroad Company, and so held for forty-eight hours for the year 1927, and I will ask you if that is a copy of a statement that was prepared by you from your records?

A. It is.

MR. MCCOLLESTER: We offer that, Mr. Examiner, as Exhibit No. 16.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 16.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 16, Witness Brown," and is forwarded herewith.)

MR. MCCOLLESTER: You may cross-examine.

CROSS-EXAMINATION.

By MR. WESTLAKE:

Q. What is the weight of a bale of silk?

A. The average weight of a bale of Japan silk is 133 1-3 pounds. There are some China bales that exceed that weight. What they call the Canton bale weighs 116 pounds.

Q. Referring to your Exhibit 16, what would be the average weight of the bales, the value of each of which is approximately $800?

MR. HAWKINS: We have an exhibit which will show the average weight.

MR. WESTLAKE: I simply want to develop the fact. I want to divide the $800 by the average number of pounds, and I would get the average value per pound. Perhaps the witness can state it—the average weight of these bales shown on Exhibit 16?

THE WITNESS: You are still asking the question?

By MR. WESTLAKE:

Q. Yes.

A. The average weight would be around 133 pounds. If I might amplify the statement, for the reason that what we call the Jap bales are in number far in excess of any other quantity.

MR. WESTLAKE: That is correct, that confirms your $6 figure.

EXAMINER SMITH: That is with the prior record.

(Witness excused.)

J. J. FENNESSY was thereupon called as a witness, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MCCOLLESTER:

Q. What is your full name?

A. J. J. Fennessy.

Q. Are you connected with the Silk Association of America?

A. Yes, sir.

Q. In what capacity?

A. Manager of the traffic bureau.

Q. How long have you been connected with that association?

A. Twelve years.

Q. What is the Silk Association of America?

A. It is an association of manufacturers of silk, importers and manufacturers and other branches of the silk industry.

Q. Do you keep a complete record of shipments of silk from the Pacific coast to New York and Hoboken?

A. My department keeps records of the consists and reports made to my bureau by the railroad companies—passing reports, and so forth.

Q. By consists, you mean consists of the trains?

A. Showing the number of cars, their numbers, and the values, and so forth, and the time.

Q. Have you those records here?

A. Yes, sir.

Q. Did you give Mr. Hawkins access to those records?

A. Yes, sir.

Q. Are those records correct, based upon the information furnished you by the railroads?

A. Yes, sir.

Q. From your study of those records, what have you to say with respect to whether or not silk moves in fast train service across the continent?

A. That is definitely understood, that it moves in passenger train service, or approximately passenger train movement.

Q. How about the delays at interchange points? Are those delays long or short? Have you any information as to that from your records?

A. We experience no delays. We get through Chicago in about an hour—an hour to three hours.

Q. What deliveries of silk are made in New York harbor by the various railroads serving New York harbor? At what points are silks delivered?

A. At the various pier stations and St. Johns Park Station—freight station on the New York Central.

Q. The pier station deliveries involve, do they not, a float movement?

A. Yes.

Examiner Smith: St. Johns Park, about 79th Street.

The Witness: No, it is at Varick and Laight Street. It is in the same vicinity as the pier.

By Mr. McCollester:

Q. Is the service of delivering silk by the Hoboken Manufacturers' Railroad through the U. S. Testing Company laboratory satisfactory to the silk trade that uses that service?

A. Well, I would say it is satisfactory. Qualifying that, we do have complaints to certain deliveries made by some of the lines at various times, but they are usually justified I would say from a transportation man's point of view.

Examiner Smith: Your association members do send silk that way, do they not?

The Witness: No, sir; not by their order. The association members purchase silk for delivery at Hoboken or Hoboken Manufacturers' Railway delivery.

Mr. Westlake: Who specifies that delivery?

The Witness: Why, the purchaser.

Examiner Smith: When they do that, they know it is going through the U. S. Testing Company?

The Witness: Absolutely.

By Mr. McCollester:

Q. Do you consider that the method of storing and delivering silk at the U. S. Testing Company laboratory is a satisfactory method of handling the silk?

A. I consider it superior.

Q. Superior to what?

A. To handling at any of the piers, because it takes it off the streets.

Q. Does your association keep records of the values of silk?

A. Yes.

Q. Have you examined your records to ascertain the average and the range of values over a given period?

A. Yes, we have a volume here which embraces the average price of Japan raw silk for the past fifty years, which shows an average foreign invoice value of $4.23 a pound from the years 1877-1878 to 1926-1927, July 1st to June 30th of each year.

Q. That is a foreign invoice value?

A. That is the consular invoice value as it is entered into this country.

EXAMINER SMITH: That means the value of the silk at Seattle?

THE WITNESS: Yes, the value of the silk, a little bit less than the bill of lading value.

By MR. MCCOLLESTER:

Q. Will you tell us what the maximum values of silk have been at various times for the years 1924 through 1927?

A. I would like to go back and make a change in that answer of mine to include where I said Japan raw silk—it is Japan and China silk. The low value——

Q. I asked for the high value.

A. The high value for 1924, using Japan double extra cracks—that is a grade of silk which you may call a base grade—on January 18, 1924, that value was $8.24.

EXAMINER SMITH: A pound?

THE WITNESS: A pound; yes, sir; and on August 3, 1924, the low value for Canton filature silk, $6.25 per pound; on December 26, 1925, the high value for Japan double extra cracks was $7.15.

On June 13, 1925, Canton filature silk was—the low of that year, at $4.80 a pound.

On January 7, 1926, Japan double extra cracks was high at $7.14 a pound, while the Canton filature silk was low at $5.05 a pound.

On April 3, 1926, Japan double extra cracks for 1927 was high at $6.15 a pound. As of April, 1928, the Canton filature was low at $4.20 a pound, on April 22nd of the same year.

Q. Are there wide and sudden fluctuations in silk values from time to time?

A. Wide fluctuations?

Q. Yes, or do the figures that you have shown illustrate fairly well the fluctuations in the values of silk from time to time?

A. That is between the low and the high.

EXAMINER SMITH: And those values as you have given them are practically c. i. f.?

THE WITNESS: Consular invoice value.

EXAMINER SMITH: That does not mean delivered here at Hoboken?

THE WITNESS: Yes, it does. It is bought cost, insurance and freight.

EXAMINER SMITH: That is what you have read, plus insurance and freight.

THE WITNESS: No, that includes cost, insurance and freight. When silk is purchased, it is bought on a c. i. f. basis. If silk is worth——

EXAMINER SMITH: That is the New York value to the buyer?

THE WITNESS: Right.

By MR. MCCOLLESTER:

Q. Have the values averaged higher in the past four years than they have over the earlier period? You gave an average for a period of twenty-five years.

A. Fifty years. Have they increased?

Q. Yes.

A. Why, during the war silk reached $17 a pound.

EXAMINER SMITH: Will you give us something of the average value on and after November 5, 1927, that you have given up to that date?

THE WITNESS: Well, I would say $5 a pound.

EXAMINER SMITH: That is speaking as of November 5, 1927, and after?

THE WITNESS: Yes, it is running now today about $5.30-$5.40.

By MR. WESTLAKE:

Q. Where did you get $5 a pound? I notice this document from which you read shows 1926 and 1927, $5.[illegible], and you say it is running $5.30.

EXAMINER SMITH: Since November 5, 1927.

MR. WESTLAKE: Exactly, but that book includes some 1927, and he says it is now $5.30. Where does he get his $5?

THE WITNESS: You will find that between November, 1927, that it probably has gone as low as $4.80, and I am offering that from my dealings with the trade, that I would say if I were buying silk and I got it at $5, that I wouldn't be getting stuck.

MR. WESTLAKE: Particularly if it was worth $5.30.

THE WITNESS: You would not buy it at $5 if it is worth $5.30.

MR. MCCOLLESTER: You may cross-examine.

CROSS-EXAMINATION.

By MR. WESTLAKE:

Q. You would buy it if you could, would you not?

A. If a fellow came to me and I had silk—in dealing with the silk and knowing the transactions that are going on, and—I know some of them that sold silk for $5.30 wished they held it for $5.50, and I know of cases where they sold it for $5.30 and wished they had sold it at $4.80.

Q. Isn't $5 just a little low?

A. If you should ask me to go into a car and pick out silk, I think it would average today lower than $5.

Q. Would it since November 5, 1921, which was the Examiner's question?

A. I will say this to you, that I will furnish the Examiners with the correct information, if it will be permissible, through our statistical bureau.

EXAMINER SMITH: Now how long a time would you want for that?

THE WITNESS: It would not take a couple of days.

EXAMINER SMITH: Ten days?

THE WITNESS: Ten days would be plenty for me.

EXAMINER SMITH: Ten days then.

By MR. WESTLAKE:

Q. Mr. Fennessy, could you tell me about what proportion of the silk delivered is through the Hoboken delivery and what of the balance is all New York delivery?

A. I would estimate that there is 36 to 42 per cent. of the silk going into Hoboken now.

MR. HAWKINS: We have an exact exhibit on that.

MR. WESTLAKE: Then I will withdraw that question.

(Witness excused.)

J. M. BAKER was thereupon recalled as a witness, and being previously sworn, further testified as follows:

DIRECT EXAMINATION.

By MR. McCOLLESTER:

Q. You testified in the previous hearing, did you not?

A. I did.

Q. And you are in the insurance business?

A. Yes, sir.

Q. You are an insurance broker?

A. Yes, sir.

Q. And you have had considerable experience, have you?

A. Twenty years.

Q. At the previous hearing it was testified, I believe, that the Hoboken Manufacturers' Railroad was carrying insurance placed by you as a broker, at the rate of 1½ cents per 100 dollars value of silk shipped, is that correct?

A. Yes.

Q. Does approximately the same insurance rate obtain at the present time?

A. Right.

Q. Has there been any change in the Hoboken Manufacturers' arrangement for their silk, and if so, what?

A. Not a bit.

Q. Do you consider 1½ cents per $100 value of silk shipped a fair rate for the risk carried for the Hoboken Manufacturers Railroad on silk?

A. I think it is cheap.

Q. Have you had any experience with a large loss on silk shipments?

A. I know that the insurance company paid a loss of approximately a million dollars under a transit policy in 1927, and there was considerable talk of increasing the rate for legal liability on silk. I do not know that rates have been increased. I know that we have been able to hold the companies in check for account of the Hoboken Shore Railroad.

MR. MCCOLLESTER: You may cross-examine.

MR. WESTLAKE: No questions.

(Witness excused.)

EXAMINER SMITH: We will recess until 1:30 P. M.

(Whereupon, at 1:00 P. M., a recess was taken until 1:30 P. M.)

AFTERNOON SESSION.

1:30 P. M.

L. D. HAWKINS was thereupon called as a witness, and being first duly sworn, testified as follows:

MR. MCCOLLESTER: Mr. Examiner, I should like to suggest, for the purpose of shortening the record, and at the same time meeting the requirements of the law, that so far as the stipulation may be binding upon the Commission, the complainants and defendants stipulate that they are each of them respectively efficiently operated, and are of importance to the public, and of such importance that their continued operation is in the public interest. We will stipulate that for the defendants if they will do the same for us.

MR. WESTLAKE: It is so stipulated for those whom I represent.

MR. PIERCE: And for the others.

EXAMINER SMITH: And that is stipulated as a matter of fact as well as a matter of law.

MR. MCCOLLESTER: I will call Mr. Hawkins.

DIRECT EXAMINATION.

By MR. MCCOLLESTER:

Q. What is your full name, please?

A. L. D. Hawkins.

Q. What is your occupation?

A. I am consulting traffic manager.

Q. Will you outline your traffic experience?

A. For a period of about twenty-three years, divided fifteen years with various transportation lines, and the remaining time as representing shippers, individually, and various other interests.

Q. Have you been retained by the complainants in this case, in the capacity of a traffic consultant and adviser for them for the purposes of the case?

A. Yes.

Q. Have you had access to their records?

A. Yes, sir.

Q. Have you had access to the records of the Silk Association?

A. Yes.

Q. Have you prepared a statement, showing the steamship lines that receive and discharge cargo at the Hoboken piers?

A. Yes, sir.

Q. Is this that statement?

A. Yes.

Q. Is it correct?

A. Yes, sir.

MR. MCCOLLESTER: We offer it as Exhibit 17, Mr. Examiners, at this time.

EXAMINER SMITH: It will be received in evidence, and marked Exhibit 17.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 17, Witness Hawkins," and is forwarded herewith.)

Q. Have you also prepared a list of the industries located on the Hoboken Manufacturers Railroad, and the principal commodities which they ship or produce?

A. Yes, sir.

Q. Is this the list?

A. Yes, sir.

Q. Is it correct?

A. Yes, sir.

MR. MCCOLLESTER: We offer that in evidence as our Exhibit No. 18.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 18.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 18, Witness Hawkins," and is forwarded herewith.)

EXAMINER SMITH: Do you mind my breaking in right there?

MR. MCCOLLESTER: No, indeed.

EXAMINER SMITH: Exhibit 17—those steamship lines do not touch the float bridge marked A on exhibit blueprint?

THE WITNESS: I don't understand so; no, sir.

EXAMINER SMITH: That float bridge is only for lighters and car floats?

THE WITNESS: Yes, and interchange of freight with rail carriers.

EXAMINER SMITH: Car floats?

THE WITNESS: Yes.

By MR. MCCOLLESTER:

Q. How is silk classified?

A. One and one-half times first class.

Q. Is that rating approved by the Interstate Commerce Commission?

A. Yes, it was before the Commission in 44 I. C. C. 578.

Q. What is the rate under which the silk here in question moves?

A. When I said it was classified one and one-half times first class, that is if the value exceeds $1 per pound, and this does so exceed it. A value of less than $1 a pound is first class. Now, the rate under which this silk moves is $9 per 100 pounds, as published by Agent Toll in his I. C. C. No. 1195, when handled in passenger trains or on approximately passenger train schedule. Since 1918 that rate has been $4

—July 1, 1918, to October 23, 1920, during that period it was $7.50. In the period October 23, 1920, to July 1, 1922, it was $10, and since July 1, 1922, it has been $9. That is a rate that is published for any quantity movement and the movement is almost entirely less than carloads, handled, however, in exactly the same manner, so far as the transportation from the Pacific ports to the interchange with the Hoboken Shore Railroad is concerned, as carload traffic.

Q. I show you a statement headed "Transcontinental Silk Handled by Hoboken Manufacturers Railroad," the first page headed "Month of October, 1927," the statement being six pages. Was this statement prepared by you?

A. Yes, sir, at my direction and under my supervision.

Q. From what records was the information shown on here secured?

A. From the records of the Hoboken Manufacturers Railroad.

MR. MCCOLLESTER: We offer this as Exhibit 19, at this time.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 19.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 19, Witness Hawkins," and is forwarded herewith.)

THE WITNESS: The first two sheets represent the October, 1927, receipts.

The second two sheets—the next two sheets, November.

And the last two pages, December.

Q. Are these shipments listed on here all of the shipments of silk handled by the Hoboken Manufacturers Railroad during the periods described?

A. All except on the first two pages—all except one shipment that arrived at their terminal on trucks, have been eliminated. The last four sheets include the shipments that

arrived by truck as well as those that arrived by rail in railroad cars. There were a very few shipments in the aggregate that arrived by truck. They were small, a few—just a few bales in each.

Q. Where did you secure the figures as to value shown on this exhibit?

A. From the billing on which the silk arrived.

Q. In other words, the values were shown on the railroad billing, were they?

A. Yes, sir.

Q. You have correctly transcribed the information from the billing and the original records of the Hoboken, have you?

A. Yes, sir.

MR. PIERCE: Could I ask right here where this silk that he shows as arriving by truck is trucked from? I notice he gives the car number.

THE WITNESS: Well, I think in every instance it was trucked from the New York Central.

MR. PIERCE: That is, from Manhattan?

THE WITNESS: I understand from St. Johns Park, but I may be wrong about that. I will explain that a little further in connection with a later exhibit.

By MR. MCCOLLESTER:

Q. Have you prepared a summary of this exhibit, Mr. Hawkins?

A. Yes, sir.

Q. Is this that summary?

A. Yes, sir.

MR. MCCOLLESTER: We offer this as Exhibit No. 20, Mr. Examiners.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 20.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 20, Witness Hawkins," and is forwarded herewith.)

THE WITNESS: And in the heading of that exhibit should be shown "Summary of Exhibit No. 19." Now, this summary includes the totals of Exhibit 19, eliminating the shipments that arrived by truck which I have previously mentioned.

Q. It may be on the typewritten minutes. May I just point out that Exhibit No. 20 shows the average value per pound of $5.24 for these individual shipments, and the average weight per car 40,000 pounds.

I show you another statement, headed "Transcontinental silk handled by Hoboken Manufacturers Railroad Company," and ask you if this was prepared in the same way and from the same sources as the previous exhibit?

A. Yes, sir; it was.

Q. And it is correct?

A. Yes, sir; it is.

MR. MCCOLLESTER: We offer this as Exhibit 21, in evidence, at this time.

EXAMINER SMITH: That will be received and marked Complainant's Exhibit 21.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 21, Witness Hawkins," and is forwarded herewith.)

THE WITNESS: The column headed "Number of shipments" might possibly be a little more accurately described if we called that "Number of consignments."

MR. MCCOLLESTER: I direct the Examiners' attention to the fact that you will find from examining this exhibit that I think there are only six cars shown on the exhibit which contain but one consignment. All the others contain more than one consignment, and some of them as many as twenty and twenty-one consignments.

THE WITNESS: Mr. McCollester, I think there are only four cars that contain only one consignment. If you counted six you would include two consignments that arrived by truck and not by car.

Q. Have you prepared a summary of that exhibit?
A. Yes, sir.

MR. MCCOLLESTER: We offer this exhibit in evidence as Exhibit 22.

EXAMINER SMITH: Complainant's Exhibit 22 will be received and so marked.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 22, Witness Hawkins," and is forwarded herewith.)

Q. Is it correct?
A. Yes, sir. The heading should read "Summary of Exhibit No. 21."

EXAMINER SMITH: Gentlemen, I have a curious mind, and while you were doing some of this necessary work, I have made a computation from your Exhibit No. 20, and unless I have my decimal badly arranged, as I sometimes do, the total ocean and rail charges for the transportation of this silk amounted to only 2½ per cent. of the total value of the commodity transported.

MR. MCCOLLESTER: Just a minute, Mr. Examiner. I think that there is a difference on this exhibit. On Exhibit 19 the freight charges shown are the ocean and rail, and on Exhibit 21 the freight charges are only rail freight charges.

THE WITNESS: That is right.

EXAMINER SMITH: Then my statement is incorrect. I carried over from one exhibit to the other the rail charges of 2½ per cent. I thought it was a remarkable showing.

MR. MCCOLLESTER: The summary, Mr. Examiner, you will see, shows an average number of consignments of 7½ per car, and average freight charges per car approximately $3600.

Just that it may be in the record, Mr. Hawkins, will you state on an average weight of 40,000 pounds, what the earnings of the Hoboken Manufacturers Railroad would be on the division of 22 cents prescribed by the Commission?

THE WITNESS: $88 a car.

By MR. MCCOLLESTER:

Q. What would that leave to the transcontinental lines, including in that term the eastern lines as well as the western lines?

A. On a 40,000-pound car, it would leave $3512.

Q. Per car?

A. Per car.

Q. Will you make similar computation on the basis of a division of 25 cents to the Hoboken?

A. That would be $100 a car for the Hoboken and $3500 for the transcontinental lines.

Q. I show you a statement headed "Miles and routes from Pacific ports to Hoboken." Was this prepared by you?

A. Yes, sir.

Q. Where did you get the information shown on here?

A. From the records of the Silk Association, so far as the routes are concerned, and from the Official Railway Guide for the distances.

Q. Are the computations from those sources correct, to the best of your knowledge?

A. Yes, sir.

MR. MCCOLLESTER: We offer this as Exhibit No. 23, at this time.

EXAMINER SMITH: It will be marked Complainant's Exhibit No. 23.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 23, Witness Hawkins," and is forwarded herewith.)

THE WITNESS: I might say further that I have made a calculation of the average total distance over all routes as shown in the exhibit and find it to be 3288 miles.

MR. MCCOLLESTER: So far as Exhibit 20 is concerned, the Examiner is correct, that the figures there are ocean and rail charges.

By MR. MCCOLLESTER:

Q. Mr. Hawkins, I show you a statement headed "Statement of carload shipments of transcontinental silk, January, 1928." That is the heading of the first page, and this is a statement of five pages. Was that prepared by you?

A. Yes, sir.

Q. What is the source of the information shown there?

A. The records of the U. S. Silk Association.

Q. Is it correct?

A. Silk Association of America.

Q. Was it correctly compiled from those records?

A. Yes, sir.

MR. MCCOLLESTER: At this time we offer this as Exhibit No. 24.

EXAMINER SMITH: Complainant's Exhibit 24 will be received and marked.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 24, Witness Hawkins," and is forwarded herewith.)

THE WITNESS: In connection with this exhibit, it should be explained that under the column headed "Delivery to Hoboken Shore," the Hoboken Shore Railroad receives silk between the hours of 7 A. M. and

5 P. M., excluding Saturday afternoons and Sundays, and we have, therefore, taken as the time of delivery to Hoboken Shore Railroad the time of arrival in Hoboken on cars which arrived at nights and on Sundays. In all other cases when cars show on the Hoboken Shore interchange during the hours for receiving freight, we took the exact time of delivery to the Hoboken Shore and the average time in transit from the various Pacific ports to the interchange of the Hoboken Shore calculated as just explained, was 94½ hours.

Q. What is the average number of cars per train?

A. 7.83. That is, that is the average number of cars that left the Pacific ports in the various trains. In the column headed "Cars," which is split three ways, the first column being the number of cars that were delivered to the Hoboken Manufacturers Railroad, the second column being the number of cars that were for other deliveries in New York, or for deliveries in New York, and the third column being headed "Other cars," that "others" includes all cars that were for delivery at other places in the United States than New York and Hoboken. They were all delivered at points Chicago, or Chicago and East.

Q. Will you for the record just compute what percentage 22 cents is of $8.78, $8.78 being what is left to the transcontinental lines if the Hoboken receives a division of 22 cents?

A. That is 2½ per cent.

Q. What percentage is 25 cents of $8.75?

A. 2.85.

Q. Assuming for the purposes of the question that the risk assumed by the carrier in handling silk is proportionate to the time the silk is in its possession, what have you to say with respect to the relation between the time the silk is in the possession of the Hoboken and the time the silk is in the possession of the transcontinental carriers?

A. On that basis, the liability of the Hoboken Shore would be slightly more than half the total liability of the transcontinental carriers. That is based on the statement that they are required to keep this freight, ready for delivery, for a period of forty-eight hours, beginning at 7 o'clock the morning following the day of arrival and notice to consignee. They have a liability as a common carrier for the period between the time the cars come into their possession and seven o'clock the next morning, and it was testified by Mr. Brown this morning that not more than 20 per cent. of the silk delivered by the Hoboken Shore Railroad is delivered within the forty-eight-hour period, and forty-eight hours is slightly more than half the total time in transit from the Pacific Coast, which as just shown was 94½ hours. However, it seems to me that the liability on silk is greater after arrival at the terminal than it is in these fast moving transcontinental trains. The average number of miles per hour made on these transcontinental runs is 34.8. I have worked that out, miles per hour.

Q. I show you a statement headed "Import rates from Pacific ports to Hoboken, N. J.," and listing a number of commodities, and purporting to show the rates thereon. Was that statement prepared by you?

A. Yes, sir.

Q. And the source of the information is shown on the statement, is it?

A. Yes, sir.

Q. It is correct?

A. Yes, sir.

MR. MCCOLLESTER: We offer this as Exhibit No. 25, at this time.

EXAMINER SMITH: Complainant's Exhibit No. 25 will be received and marked.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 25, Witness Hawkins," and is forwarded herewith.)

Q. The average rate shown at the bottom of that exhibit, is that just a mathematical average or a weighted average?

A. That is a mathematical average.

MR. WESTLAKE: May I ask the purpose of this exhibit?

MR. MCCOLLESTER: We are coming to that in a few minutes.

MR. WESTLAKE: I would like to have it stated, so that I may object to it if the purpose does not suit me.

MR. MCCOLLESTER: I think the purpose is perfectly obvious. It shows what is earned for handling cars of other freight under existing published rates.

By MR. MCCOLLESTER:

Q. Have you prepared a statement, which I show you, headed "Rates from Seattle and Vancouver to Hoboken"?

A. Yes, sir.

Q. Is this statement correct?

A. Yes, sir.

MR. MCCOLLESTER: We offer this exhibit in evidence as our Exhibit 26.

EXAMINER SMITH: It will be received and marked Complainant's Exhibit 26.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 26, Witness Hawkins," and is forwarded herewith.)

EXAMINER SMITH: Exhibits 25 and 26 are not accompanied by other exhibits showing the time of movement?

MR. MCCOLLESTER: Oh, no.

Q. I show you still another statement headed "Rates from San Francisco to Hoboken." Was that also prepared by you?

A. Yes, sir.

Q. Was it correctly compiled from the source shown?

A. Yes, sir.

MR. MCCOLLESTER: We offer Complainant's Exhibit 27 in evidence.

EXAMINER SMITH: Complainant's Exhibit 27 will be received and marked.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 27, Witness Hawkins," and is forwarded herewith.)

THE WITNESS: Exhibits 26 and 27 are based on the domestic rates and Exhibit 25 is the import rates.

Q. Now, referring to Exhibit No. 25, on the commodities that are shown on that exhibit, what division out of the rates there shown would the Hoboken Manufacturers Railroad receive?

A. 7¼ cents per 100 pounds.

EXAMINER SMITH: That is the new division agreed to?

THE WITNESS: Yes, sir.

Q. Is that based on the Hoboken's unloading the freight?

A. Yes, sir.

Q. Now will you just compute for the minutes, taking the average rate of 1.626 shown there and show what would be left for the transcontinental lines out of the average rate?

A. 1.5435.

Q. What proportion does the Hoboken's division of 7¼ cents—what percentage does the Hoboken's division of 7¼ cents bear to the total average rate of 1.626?

A. 4.4 per cent.

Q. What percentage is 22 cents of the total value rate on silk of $9?

A. 2.66 per cent.

Q. What percentage is 25 cents of the value rate of $9?

A. 2.77 per cent.

Q. Looking at Exhibit 27, assuming a weight of 40,000 pounds per car, what would the per car earnings be at the average rate of $1.70?

A. $680.

Q. What would the Hoboken's proportion of that be per car?

A. $29.

Q. Leaving how much for the transcontinental lines?

A. $651.

Q. As compared with how much have they, did you say, on silk?

A. At 22 cents, $88.

Q. How does the proportion of 22 cents on silk for the Hoboken compare with its proportion out of the rates on the various commodities shown on these three exhibits?

A. You mean their percentage proportion?

Q. No, what I had in mind was how its 22 cents compared with 7¼ cents?

A. Oh, it is about three times.

Q. How many times their earnings on these other commodities do the transcontinental lines receive on silk, assuming the Hoboken gets 22 cents?

A. Between five and six times as much.

Q. Now I show you a statement headed "Statistical exhibit pertaining to general operations 1927." Was this prepared by you or under your direction?

A. Yes, sir.

Q. From what source did you secure the information shown on this exhibit?

A. From the annual reports of the carriers indicated to the Interstate Commerce Commission.

Q. The information was correctly compiled from those reports to the best of your knowledge?

A. Yes, sir.

MR. MCCOLLESTER: We offer this exhibit as Complainant's Exhibit 28.

EXAMINER SMITH: Complainant's Exhibit 28 will be received and marked.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 28, Witness Hawkins," and is forwarded herewith.)

Q. Five and three-quarters per cent. of the total investment in railway property, reported by the Hoboken in its annual report to the Commission as I figure it is $62,996.60?

A. That sounds about right.

Q. That is subject to check?

A. Yes.

Q. Have you any comments on this?

A. Well, I think the figures speak for themselves. I do not see any use in commenting on the fact that the earnings of the Hoboken Shore Railroad are very much less than that of almost all the carriers shown, the two exceptions being one, to show the smaller percentage of net railway operating income as compared with total investment in railway property, being the Chicago Great Western and the Oregon & Washington Railroad & Navigation Company.

Q. Those are the only two roads shown on here whose percentage of net railway operating income to total investment is less than that of the Hoboken?

A. Yes, sir.

Q. The Hoboken earned a deficit of $5572 for 1927, is that correct?

A. Yes, sir.

Q. How did you select the railroads other than the Hoboken shown on this statement?

A. They are the railroads that participated in the handling of this transcontinental silk during the first five months of this year, with the exception of the Canadian National and the Canadian Pacific Railway, which have been omitted, because of the fact that the data as to those railroads was not available.

Q. I show you a statement headed "Statistical exhibit pertaining to freight service operations 1927." Was that compiled by you?

A. Yes, sir.

Q. What was the source of the figures shown there?

A. As indicated on the foot of the exhibit.

MR. MCCOLLESTER: We offer this as Exhibit No. 29 at this time.

EXAMINER SMITH: That will be received as Complainant's Exhibit 29.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 29, Witness Hawkins," and is forwarded herewith.)

Q. I show you another statement headed "Statistical exhibit pertaining to passenger service operations 1927." Was that also prepared by you?

A. Yes, sir, under my supervision.

Q. And the sources of the data are shown on the exhibit?

A. Yes, sir.

MR. MCCOLLESTER: We offer Complainant's Exhibit No. 30 in evidence.

EXAMINER SMITH: Complainant's Exhibit No. 30 will be received and marked.

(The same was thereupon received in evidence, marked "Complainant's Exhibit No. 30, Witness Hawkins," and is forwarded herewith.)

Q. The railroads shown on Exhibits 29 and 30 are the same as the railroads shown on Exhibit 28, are they?

A. Yes, sir.

Q. Other than the Hoboken?

A. Yes, sir; transcontinental railroads.

Q. They are the roads that handled this silk during the first part of 1928?

A. Yes, sir.

MR. PIERCE: Is that punctuation mark meant to be a point instead of a comma in the last column on Exhibit 30?

A. That ought to be a period instead of a comma.

By MR. MCCOLLESTER:

Q. Mr. Hawkins, can you state for the record, computing it from the data that you have compiled, what the average revenue per car mile is for the transcontinental lines on silk, on the basis of a division to the Hoboken of 22 cents?

A. $1.07, after deducting the 22 cents for the Hoboken Shore Railroad.

Q. Did you find any railroad that had revenue per passenger car mile anywhere nearly that figure?

A. No, sir; the nearest approximation is a little less than 50 per cent.

EXAMINER SMITH: Delaware, Lackawanna & Western, on Exhibit 30, 51 cents, is that right?

THE WITNESS: That is right.

Q. Anything further that you want to say?

A. No, that is all.

MR. MCCOLLESTER: You may cross-examine.

CROSS-EXAMINATION.

By MR. WESTLAKE:

Q. How much do you get out of each one of these cars for the 22 cents?

A. How much what?

Q. How much revenue, $88?

A. $88.

Q. How many miles do you haul it?

A. We don't haul it a mile.

Q. Get over $88 a car mile then, is that right?

A. We would like to have 25 cents and get a hundred dollars.

Q. What is the date of the Commission's decision, if you have it available, in 44 I. C. C. 578, at which time you said the Commission fixed a rating of 1½ times first class on silk, where it was worth more than $1 a pound?

A. Well, that was in the summer of 1915. My memorandum shows effective June 2, 1915, but I do not know just what that phrase means, effective, and I don't know that I said that the Commission fixed the rating.

Q. I understood you to say it did.

MR. MCCOLLESTER: I asked him if it had approved that rating and he answered yes.

Q. Did the Commission fix the rating of 1½ times first class on silk at more than $1 a pound?

A. The complainants in that case were the Silk Association of America, and they tried to have that rating reduced, and the Commission refused to reduce it below 1½ times first class, but it was to cover an entirely different kind of a movement than what we have here in mind. The record in that case showed the average shipment to be from ten to fifteen bales, and also for very short hauls, like a few bales going out here to Scranton, Pa., moving through—moving within official territory on the transcontinental carload movement. That is my impression from reading the record in that case.

Q. Freight train service?

A. I don't know that the question of service was in the record, I do not recall it.

Q. How long has it been since you read that report?
A. Oh, about three days.
Q. Did you read the record in that case?
A. No, sir.

MR. WESTLAKE: That is all.

(Witness excused.)

MR. MCCOLLESTER: That concludes our case in chief, Mr. Examiners.

E. A. HODKINSON was thereupon called as a witness, and being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. PIERCE:

Q. What position do you hold with the Trunk Line railroads?
A. Commerce statistician.
Q. You have had a number of years' experience in the accounting department of the best railroad in the east?
A. Yes, sir; I was with the Erie for fourteen years.
Q. And you had a number of years' experience as a consulting traffic manager for industries in general?

MR. MCCOLLESTER: Qualifications are admitted.

Q. Have you prepared a statement, showing the rate of return on property investment of four of the Trunk Lines and then four of the Central Freight Association Trunk Line systems—that is, the interterritorial systems?
A. Yes, sir; I have, eight roads in all.
Q. They are defendants named in this case?
A. Yes.
Q. Is that statement correct?
A. Yes, sir.

Q. You offer that?
A. Yes.

MR. PIERCE: We offer it in evidence as Exhibit No. 31, at this time.

EXAMINER SMITH: Defendants' Exhibit No. 31 will be received and marked.

(The same was thereupon received in evidence, marked "Defendants' Exhibit No. 31, Witness Hodkinson," and is forwarded herewith.)

MR. PIERCE: Cross-examine.

MR. MCCOLLESTER: No questions.

MR. PIERCE: That concludes the defendants' case, that is subject to my controversial partners.

MR. WESTLAKE: We have no testimony.

MR. MCCOLLESTER: Mr. Examiners, on that statement that we were to furnish of values, I would like to add to that, with the permission of the other side, a statement of the average values for each of the last ten years, together with the highest and the lowest values, which I understood you asked for on November 4, 1927, or from then to date; is that correct?

MR. WESTLAKE: Mr. Examiners, that exhibit that was put in, I think it was No. 20, showed an average value for October, November and December, 1927, a weighted average value of $5.24. As far as my people are concerned, we are willing to accept that as the average value of this silk. I don't think it makes much difference for the purpose of this case whether it is $5 or $6.

EXAMINER SMITH: Gentlemen, let us agree, the value of this silk, for the purpose of this case, during the fall, November, say 1927, was $5.24.

MR. MCCOLLESTER: I am willing to agree to that, Mr. Examiner, but I should also like this to appear in the record: I think that the Commission ought to know it, and I think our friends on the other side—it is to their interest as well as ours, to show there is a fluctuation in the values of silk.

EXAMINER SMITH: You have shown that up to eight, nine and ten dollars. The record so shows now.

MR. MCCOLLESTER: I mean if we fix divisions on the basis of $5, it might hurt one or the other of us.

EXAMINER SMITH: I do not think division is going to be fixed on the value of $5.

Gentlemen, is that the case?

MR. WESTLAKE: Yes.

EXAMINER SMITH: Gentlemen, what time do you want for your briefs?

(Informal discussion, off the record, which was not recorded.)

EXAMINER SMITH: Briefs will be due August 15th. Are there any papers to be filed?

MR. MCCOLLESTER: There was a statement of values, and that is not needed now.

EXAMINER SMITH: So there are no documents to be filed.

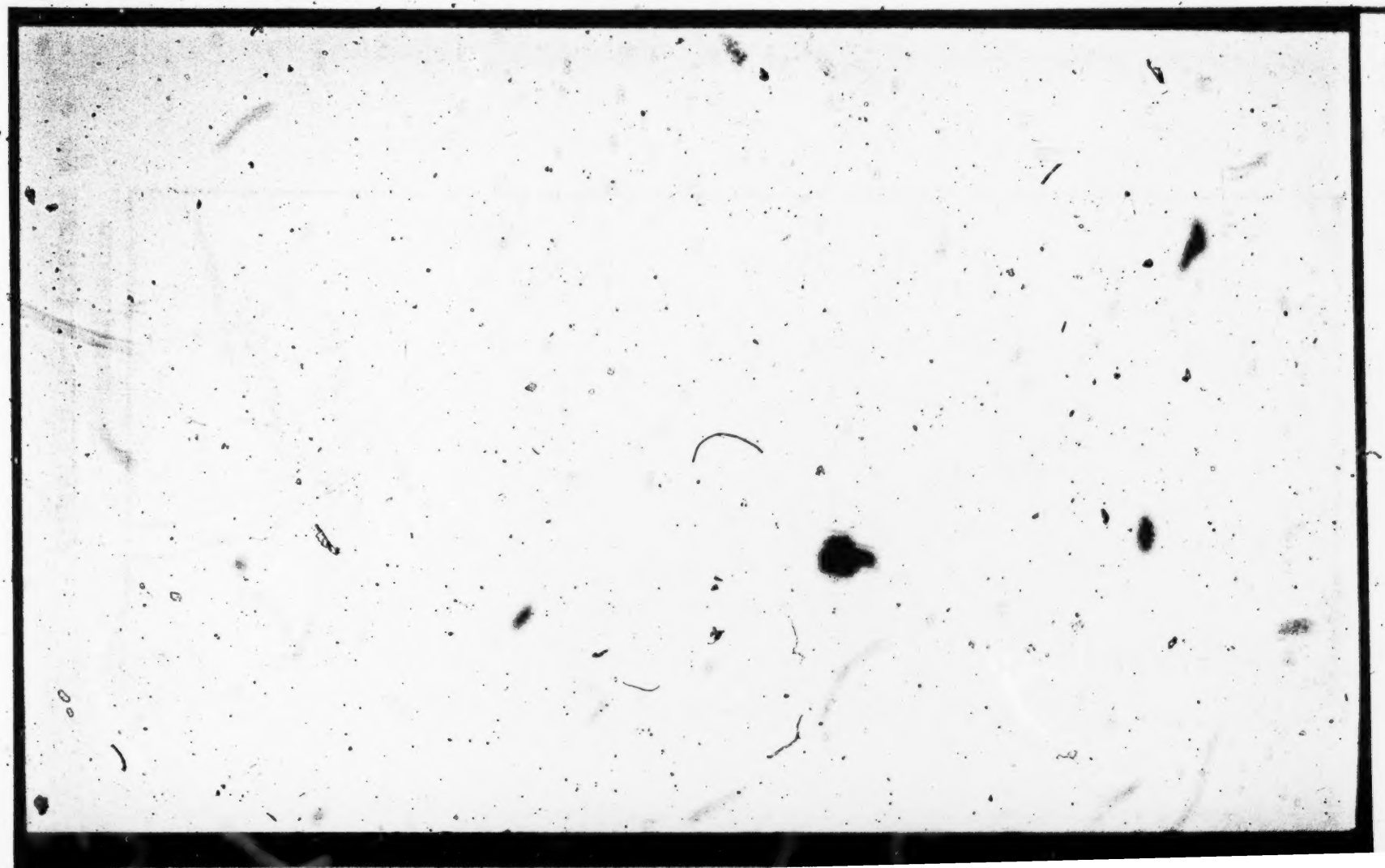
I believe Mr. McCollester and Mr. Marion Pierce will get the free copies?

MR. PIERCE: Yes, sir.

MR. MCCOLLESTER: Yes, sir.

EXAMINER SMITH: If there is nothing further, the hearing is closed.

(Whereupon, at 2:50 P. M., July 13, 1928, the hearing in the above matter was closed.)



Complainant's Exhibit No. 10, Witness Hobbs 927

COMPLAINANT'S EXHIBIT NO. 10, Witness Hobbs.

Docket No. 18072
Exhibit No.
Witness

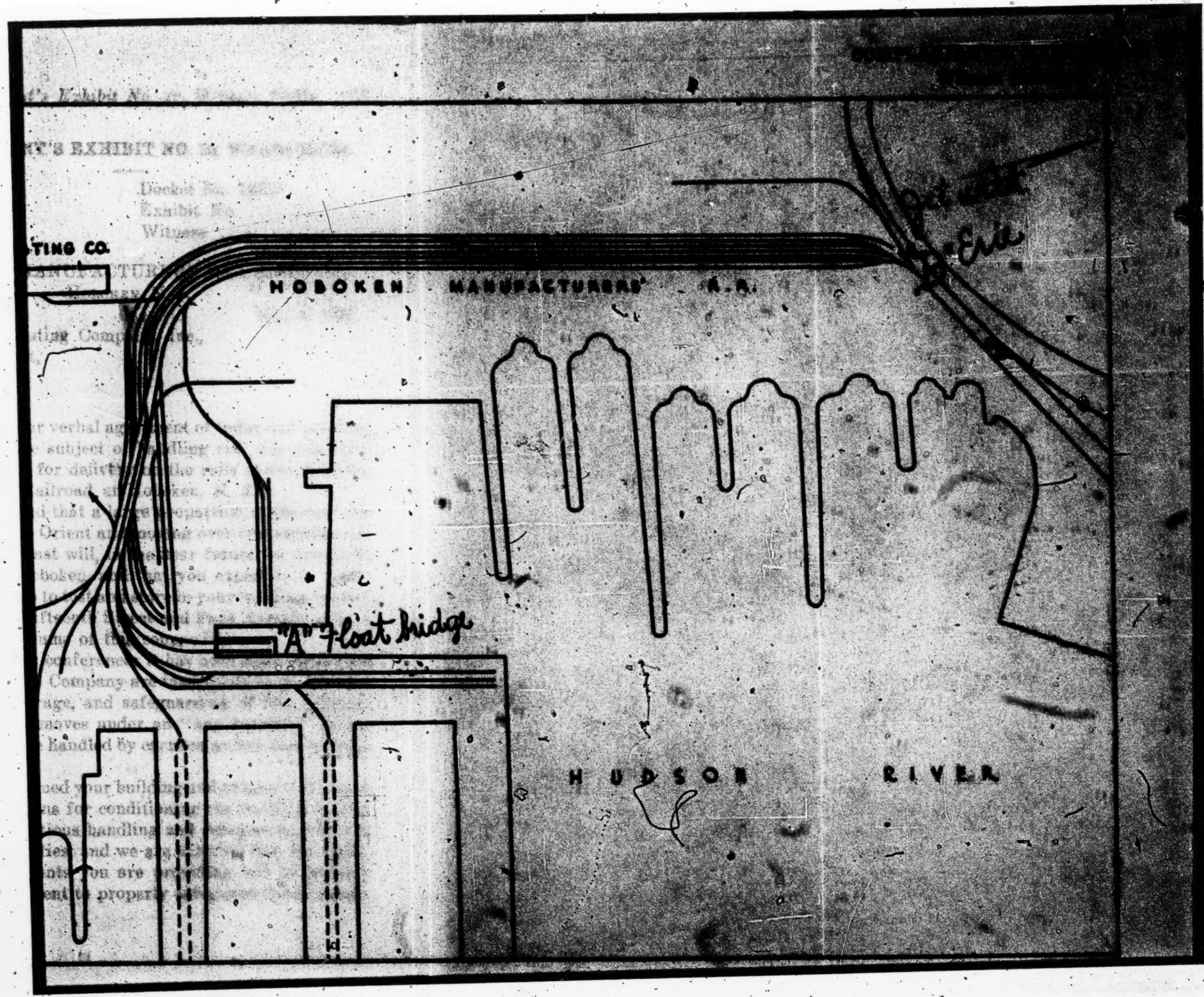
U.S. TESTING CO.

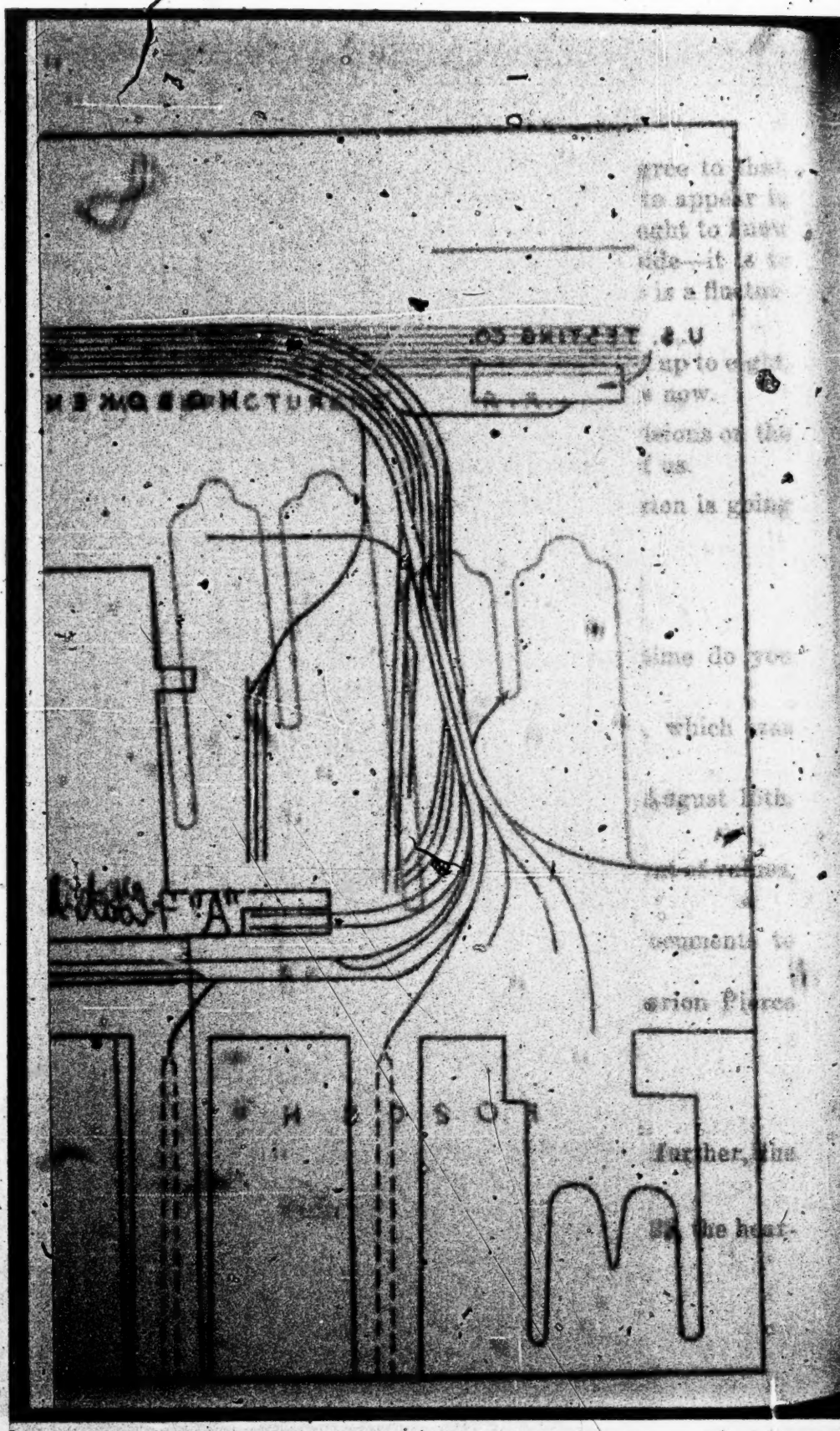
HOBOKEN

May 4, 1926

"A" Float Bridge

HUDSON


TING CO.
HOBOKEN MANUFACTURERS' R.R.
Erie
"A" Float bridge
HUDSON RIVER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COMPLAINANT'S EXHIBIT NO. 10, Witness Hobbs.

Docket No. 18672
Exhibit No. .....
Witness .....

HOBOKEN MANUFACTURERS RAILROAD CO.
HOBOKEN, N. J.

May 4, 1926

United States Testing Company, Inc.,
340 Hudson Street,
New York City.

Gentlemen:

Confirming our verbal agreement of today and previous conferences on the subject of handling raw silk and other textiles consigned for delivery on the rails of the Hoboken Manufacturers' Railroad at Hoboken, N. J.:

We understand that a large proportion of the raw silk imported from the Orient and moving over transcontinental railroads to the East will, in the near future, be consigned for delivery in Hoboken, and that you expect to be called upon by consignees to test and store in your building, located on our tracks at Fifteenth Street and Park Avenue, a large and increasing volume of this commodity.

In our various conferences it has been made clear that the facilities of this Company are inadequate to provide for the unloading, storage, and safeguarding of this valuable commodity, which moves under an "any quantity" rating and as such must be handled by carriers as less than carload freight.

We have examined your building and premises and have gone over your plans for conditioning the building to provide for the expeditious handling and safeguarding of silk and other commodities, and we are satisfied that the facilities and arrangements you are providing will be entirely adequate and sufficient to properly safeguard the merchan-

dise and economically perform the service which cannot be accomplished with our limited facilities and equipment.

It is the desire of this Company to aid by every practical method in the commercial development and economic distribution of traffic. We are, therefore, agreeable to accepting your offer to engage the facilities of your plant for the unloading, storage, and delivery of raw silk and other textiles that may be tendered us for delivery to consignees.

It is agreed that, when silk and other textiles (such as are tested and stored by you) are received by this Company for delivery, the cars containing such freight will be placed on the side-track serving your plant; the unloading will be performed by your labor under the joint supervision of your Company and this Company; and you will hold such merchandise on storage in your warehouse during the free time allowed by law, making delivery to consignee during the free time of such freight as may be certified by this Company as proper to deliver; and, in the case of any freight remaining undelivered to consignees at expiration of free time, you, as a public warehouse, will automatically take such freight into storage for account of this Company and issue warehouse receipts therefor,—warehouse receipts to be returned to you when bills of lading are surrendered by consignees to this Company.

For the services you perform for us in unloading, checking, storage over free time and delivery to consignees, we agree to pay you the actual cost as may be shown by itemized statements and analyses of your costs, to be submitted by you from time to time.

This Company will place all necessary terminal insurance to cover the free time period on all merchandise unloaded and stored in your warehouse, your company to accept complete responsibility as a public warehouse on expiration of free time when merchandise is taken into storage by you for our account.

It is understood that you will make collection from consignees or owners of all charges accruing against mer-

chandise after placement in storage at expiration of free time, without recourse to this Company. In other words, all charges accruing after the freight is placed in storage with you upon expiration of free time are to be considered as charges payable by consignees or other parties entitled to take delivery, and are not in any wise to be assessed against or assumed by this Company.

It is also understood that your Company, in performing the service of unloading and storage during free time and delivery of merchandise either during or after expiration of free time, will take all necessary precautions to protect the merchandise and effect proper delivery, and satisfy itself that all charges have been paid and that the merchandise is delivered to the owners or their duly authorized representatives.

It is understood and agreed that the employees of this Company shall have access at all reasonable times for the inspection of all merchandise unloaded at and/or stored in your building for our account.

It is agreed that this arrangement is subject to change from time to time as conditions or circumstances for the convenience of either party may justify. It is further understood that this agreement for the use of your facilities by this Company shall continue in effect until ninety days' notice in writing is given by either party to the other of its desire to terminate the same.

This letter is transmitted in duplicate, and if the arrangement as outlined is in accordance with your understanding, your signature on the duplicate herewith will constitute our mutual agreement.

Yours truly,
(Signed) C. D. O'Neal,
General Manager.

CDO/ss

Approved and accepted
United States Testing Company, Inc.
By
(Signed) E. C. Brown,
May 5, 1926

COMPLAINANT'S EXHIBIT No. 11, Witness Hobbs.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY.
REVISED BOOK VALUE AS OF DECEMBER 31, 1927.

Docket No. 18672.
Exhibit No. 11.
Witness Hobbs.

Acct.	Railroad	Original Valuation		Depreciation		Net Book Value	
1	Engineering	24,611.02				24,611.02	
8	Ties	30,077.70				30,077.70	
9	Rails	117,140.66				117,140.66	
10	Other Track Material	36,515.39				36,515.39	
11	Ballast	7,933.68		1,220.00		6,713.68	
12	Track Laying & Surfacing	74,178.76		2,622.00		71,556.76	
13	Right of Way Fences	2,692.00		1,317.12		1,374.88	
15	Crossings & Signs	181.00		73.00		108.00	
16	Stations & Office Buildings	32,968.30		13,282.52		19,685.78	
	A—Fifth St. Office Bldg.		14,542.30		11,882.95		2,659.35
	B—Fifth St. Shed & Platform		8,298.00		638.11		7,659.89
	C—Holland Pier Platform		7,340.00		153.36		7,186.64
	D—Wilson Line "		487.00		124.27		362.73
	F—Float Bridge Checker Shanty & Pump House		448.00		135.40		312.60
	G—Scandinavian Pier-Checkers Shanty		310.00		110.65		199.35
	H—Garage at Motor House		663.00		176.08		486.92
	O—Wood Freight Platform—Munson Line		880.00		61.70		818.30
			32,968.30		13,282.52		19,685.78
19	Fuel Stations	712.00		636.36		75.64	
20	Shops & Enginehouses	10,243.58		4,791.97		5,451.61	
	A—Carpenter Shop & Shed—15th St. Yard		1,716.60		827.80		888.20
	B—Storehouse & Office, 15th St.		2,294.18		770.91		1,523.27
	D—Furniture & Fixture at Motor House		5,142.40		2,808.29		2,334.11
	E—Platform & Runway at Motor House		185.00		80.39		104.61
	F—Shed at Motor House		906.00		304.58		601.42
			10,243.58		4,791.97		5,451.61
22	Wharves and Docks	62,559.59		8,338.79		54,220.80	

23	Wharves and Docks	62,559.59		8,338.79	54,220.80	
	A—Float Bridge		47,569.00		5,708.52	41,860.48
	C—Improvements on Scandinavian Trestle		14,990.59		2,630.27	12,360.32
			62,559.59		8,338.79	54,220.80
32-33	Power Distribution Systems and Power Lines, Poles & Fixtures	18,335.60		4,763.53	13,572.08	
35	Miscellaneous Structures	135.00			135.00	
39	Assessments for Public Improvements	20,941.29			20,941.29	
44	Shop Machinery	2,877.00		1,582.00	1,295.00	
46	Power Sub-Station App'tus	2,445.00		868.56	1,576.44	
47	Unapplied Construction Material & Supplies	1,235.19			1,235.19	
	Total Road	445,782.76		39,495.84	406,286.92	
	EQUIPMENT					
51	Steam Locomotives	17,216.07		2,687.10	14,528.97	
52	Other Locomotives	49,000.00		38,968.83	10,031.17	
57	Work Equipment	8,131.92		4,968.52	3,163.40	
58	Miscellaneous Equipment	56,067.02		37,193.05	18,873.97	
	Total Equipment	130,415.01		83,817.50	46,597.51	
	GENERAL					
71-76	General Expenditures	11,375.40		1,833.00	9,542.40	
		587,573.17		125,146.34	462,426.83	

COMPLAINANT'S EXHIBIT No. 12, Witness Hobbs. **Docket No. 18672.**
Exhibit No. 12.
Witness Hobbs.

HOBOKEN MANUFACTURERS' RAILROAD CO.

DEPRECIATION, 1927.

Acct.		Investment	Rate %	Depreciation Credits	Depreciation Accrued	Total Depreciation Dec. 31-1927
	RAILROAD					
1	Engineering	24,611.02				
2	Land for Transportation purposes	33,339.00				
8	Ties	30,077.70				
9	Rails	117,140.66				
10	Other Track Material	36,515.39				
11	Ballast	7,933.68				1,220.00
12	Track Laying & Surfacg.	74,178.76				2,622.00
13	Right of Way Fences	2,692.00	5%		134.60	1,317.12
15	Crossings & Signs	181.00	5%		9.00	73.00
16	Stations & Office Bldgs.	32,968.30	2%		622.89	13,282.52
19	Fuel Stations	712.00	4%		28.48	636.36
20	Shops & Engine Houses	10,243.58	2%		204.87	4,791.97
23	Wharves and Docks	62,559.59	4%		3,504.03	8,338.79
(32)	Power Distr. System—					
33)	Power Lines, Poles & Fix.	18,335.60	2%	112.20	373.32	4,763.53
35	Miscellaneous Struct's	135.00	...	.....	.....	.....
39	Assessmts. for Public Improvements	20,941.29	...	.....	.....	.....
44	Shop Machinery	2,877.00	5%		143.85	1,582.00
46	Power Sub-Stat. Apparatus	2,445.00	5%		122.25	868.56
47	Unapplied Contruction Material & Supplies	1,235.19	...	.....	.....	.....
	Total Road	479,121.76			5,143.29	39,495.84
	EQUIPMENT					
51	Steam Locomotives	17,216.07	4%		688.64	2,687.10
52	Other Locomotives	49,000.00	2%		980.00	38,968.83
57	Work Equipment	8,131.92	4%		325.28	4,968.52
58	Miscellaneous Equipment	56,067.02	10%		5,606.70	37,193.05
	Total Equipment	130,415.01			7,600.62	83,817.50
	GENERAL					
71-76	General Expenditures	11,375.40	...		.....	1,833.00
		620,912.17			12,743.91	125,146.34

Depreciation Charged to Expenses

Ways and Structures 5,143.29

	Railroad						
1	Engineering	24,611.02					
2	Land for Transportation purposes	33,339.00					1,220.00
8	Ties	30,077.70					2,622.00
9	Rails	117,140.66					
10	Other Track Material	36,515.39					
11	Ballast	7,933.68					
12	Track Laying & Surfacg.	74,178.76					
13	Right of Way Fences	2,692.00	5%		134.60		1,317.12
15	Crossings & Signs	181.00	5%		9.00		73.00
16	Stations & Office Bldgs.	32,968.30	2%		622.89		13,282.52
19	Fuel Stations	712.00	4%		28.48		636.36
20	Shops & Engine Houses	10,243.58	2%		204.87		4,791.97
23	Wharves and Docks	62,559.59	4%		3,504.03		8,338.79
32)	Power Distr. System—						
33)	Power Lines, Poles & Fix.	18,335.60	2%	112.20	373.32		4,763.53
35	Miscellaneous Struct's	135.00	...	.....	.....		.....
39	Assessmts. for Public Improvements	20,941.29	...	.....	.....		.....
44	Shop Machinery	2,877.00	5%		143.85		1,582.00
46	Power Sub-Stat. Apparatus	2,445.00	5%		122.25		868.56
47	Unapplied Contruction Material & Supplies	1,235.19	...	.....	.....		.....
	Total Road	479,121.76			5,143.29		39,495.84
	Equipment						
51	Steam Locomotives	17,216.07	4%		688.64		2,687.10
52	Other Locomotives	49,000.00	2%		980.00		38,968.83
57	Work Equipment	8,131.92	4%		325.28		4,968.52
58	Miscellaneous Equipment	56,067.02	10%		5,606.70		37,193.05
	Total Equipment	130,415.01			7,600.62		83,817.50
	General						
71-76	General Expenditures	11,375.40	...		.....		1,833.00
		620,912.17			12,743.91		125,146.34

Depreciation Charged to Expenses

Ways and Structures		5,143.29
Leased Prop.	(538.60)	
	(890.64)	1,429.24
		6,572.53

Equipment

Equipment	7,600.62
Leased—Snow Plow	148.00
	7,748.62

COMPLAINANT'S EXHIBIT No. 13, Witness Hobbs.

Docket No. 18672.*
Exhibit No. 13.
Witness ~~Hobbs.~~
Burhorn.

APPRAISAL OF ALL LANDS HELD BY THE HOBOKEN MANUFACTURERS' RAILROAD COMPANY UNDER LEASE FROM THE HOBOKEN RAILROAD WAREHOUSE AND STEAMSHIP CONNECTING CO., AND THE HOBOKEN LAND AND IMPROVEMENT ~~COMPANY~~, TOGETHER WITH CERTAIN STREET RIGHTS.

East Side of Park Avenue	260,000.00
Park Avenue to 14th Street	345,937.50
14th Street to Elysean Park	17,220.00
Elysean Park to 5th Street	213,000.00
Front of Hudson Square Park	6,000.00
Branch No. 1	81,600.00
Total	923,757.50
Plot "A"	180,332.50
Plot "B"	315,300.00
Plot "C"	63,108.00
Total	1,483,498.00

*(See pp. 233, 241).

Real Estate Owned

Block 125—Willow	10,120.00	
" " "	12,144.00	
" 126—Park Ave.	8,750.00	
Plot "V"	51,526.00	
Total Owned		82,540.00
		1,565,038.00

Appraisal of above Lands
By C. Alfred Burhorn—
Edward McDermott
July 18, 1927.

COMPLAINANT'S EXHIBIT No. 14, Witness Hobbs.

Docket No. 18672.
Exhibit No. 14.
Witness Hobbs.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY.

VALUATION—5.75%

Appraised Value of Land	
Under Lease	1,482,498.00
Owned	82,540.00
	1,565,038.00
Book Investments	
Road	457,158.16
Equipment	130,415.01
	587,573.17
Total Valuation	2,152,611.17
5.75% on Valuation	123,775.14

COMPLAINANT'S EXHIBIT NO. 15, Witness Hobbs

Docket No. 18672.
Exhibit No. 15.
Witness Hobbs.

Jan. 1-27 Trk Line
Other June 1-27

HOBOKEN MANUFACTURERS' RAILROAD COMPANY.

STATEMENT OF OPERATIONS—JULY 1st, 1927 TO MAY 31st, 1928, incl.

Increased Silk Rate Included From Nov. 1, 1927.

	Six Months ending Dec. 31, 1927	Jan. 1, 1928 to May 31, 1928	Total July 1, 1927 to May 31, 1928
Railway Oper. Revenue	$187,158.24	$214,276.49	$401,434.73
Railway Opertg. Exps.	138,255.77	153,643.51	291,899.28
Net Rev. from Ry. Oper.	48,902.47	60,632.98	109,535.45
Railway Tax Accruals	24,302.74	20,008.10	44,310.84
Ry. Oper. Revenue	24,599.73	40,624.88	65,224.61
Non-Operating Income	1,960.37	1,033.04	2,993.41
Gross Income	26,560.10	41,657.92	68,218.02
Deductions from Gross Inc.	26,360.35	18,635.03	44,995.38
Net Income	199.75	23,022.89	23,222.64
June 1928, Net Income estimated			3,000.00

Complainant's Exhibit No. 15, Witness Hobbs 239

Excluding Increased Rate of Silk $4.40 per Ton.

	Six Months ending Dec. 31, 1927	Jan. 1, 1928 to May 31, 1928	Total July 1, 1927 to May 31, 1928
Railway Oper. Revenue	$180,919.92	$197,271.15	$378,191.07
Railway Operatg. Exps.	138,255.77	153,643.51	291,899.28
Net Rev. from Ry. Oper.	42,664.15	43,627.64	86,291.79
Railway Tax Accruals	24,302.74	20,008.10	44,310.84
Ry. Oper. Revenue	18,361.41	23,619.54	41,980.95
Non-Operating Income	1,960.37	1,033.04	2,993.41
Gross Income	20,321.78	24,652.58	44,974.36
Deductions from Gross Inc.	26,360.35	18,635.03	44,995.38
Net. Income	6,038.57‡	6,017.55	21.02‡
June 1928, Net Income estimated			249.13‡

‡Deficit.

COMPLAINANT'S EXHIBIT No. 16, Witness Brown.

Docket No. 18672.
Exhibit No. 16.
Witness Brown.

STATEMENT SHOWING THE DATES AND NUMBER OF BALES OF RAW SILK RECEIVED BY THE UNITED STATES TESTING COMPANY, INC., FOR THE RISK AND ACCOUNT OF THE HOBOKEN MANUFACTURERS' RAILROAD CO. AND SO HELD FOR FORTY-EIGHT HOURS, SUNDAYS AND HOLIDAYS EXCEPTED, AFTER DATE OF RECEIPT.

VALUE PER BALE, APPROXIMATELY $800.00.

1927

Date	Bales	Date	Bales	Date	Bales
Jan. 3	405	Feb. 21	355	Apr. 1	1,590
" 6	1,069	" 23	991	" 4	1,351
" 7	344	" 28	1,068	" 2	95
" 10	2,475			" 11	1,592
" 11	888	Total	8,182	" 12	232
" 14	697			" 13	255
" 17	50	Mar. 1	606	" 15	1,766
" 18	971	" 5	40	" 16	586
" 22	972	" 8	2,265	" 18	947
" 24	784	" 11	2,043	" 22	1,496
" 29	1,422	" 14	1,019	" 23	571
" 31	775	" 15	10	" 25	1,382
		" 17	151	" 28	101
Total	10,852	" 19	595	" 29	1,178
		" 21	272	" 30	605
Feb. 1	376	" 22	590		
" 3	657	" 23	307	Total	13,747
" 4	695	" 25	876		
" 11	555	" 26	547	May 2	695
" 14	290	" 28	271	" 4	100
" 15	1,841	" 29	760	" 7	2,088
" 16	887			" 9	355
" 18	467	Total	10,352	" 10	137

Date	Bales
May 11	115
" 13	2,932
" 16	1,481
" 17	135
" 19	21
" 21	266
" 23	1,560
" 24	1,173
" 26	201
" 27	1,435
" 28	1,125
" 31	851
Total	14,670
June 1	50
" 3	1,576
" 6	847
" 8	140
" 10	964
" 11	2,187
" 13	434
" 14	185
" 16	799
" 20	1,483
" 22	110
" 23	1,258
" 24	1,748
" 25	483
" 27	668
Total	12,932
July 1	1,535
" 5	873
" 6	10
" 8	618
" 9	1,907
" 11	50
" 13	1,665
" 15	1,710
" 18	1,030

Date	Bales
July 19	20
" 20	30
" 22	1,063
" 23	995
" 25	1,302
Total	12,808
Aug. 1	2,288
" 2	2,211
" 3	30
" 5	2,810
" 8	840
" 9	211
" 11	30
" 12	1,150
" 15	4,946
" 16	25
" 17	563
" 19	823
" 20	2,542
" 22	2,153
" 23	967
" 26	1,191
" 29	1,106
" 30	210
Total	23,996
Sept. 1	1,474
" 2	1,154
" 6	1,221
" 7	257
" 9	10
" 10	1,521
" 12	3,681
" 14	80
" 16	1,982
" 19	3,241
" 20	293
" 24	315
" 26	250

Date	Bales
Sept. 27	2,255
" 28	948
" 29	679
" 30	464
Total	19,825
Oct. 3	2,470
" 4	124
" 7	1,865
" 8	408
" 10	1,686
" 11	122
" 13	27
" 14	1,196
" 15	1,147
" 17	308
" 18	240
" 20	2,287
" 22	156
" 24	1,341
" 25	10
" 26	2,335
" 28	1,837
" 29	1,073
" 31	201
Total	18,833
Nov. 1	838
" 2	320
" 3	10
" 7	40
" 9	1,729
" 10	7
" 11	631
" 12	2,839
" 14	100
" 16	1,647
" 17	10
" 18	523
" 19	2,805

Date	Bales	Date	Bales
Nov. 21	90	Dec. 13	490
" 23	160	" 15	1,401
" 25	1,251	" 16	110
" 26	2,709	" 17	1,470
" 29	86	" 19	1,722
		" 20	200
Total	15,795	" 22	10
		" 23	340
Dec. 1	30	" 27	1,439
" 6	3,172	" 28	20
" 7	439	" 30	892
" 9	1,478	" 31	295
" 10	1,524		
" 12	238	Total	14,870

1928.

On 17 days January .....18,392 bales were received.
On 15 days February.....17,482 " " "
On 20 days March .....17,898 " " "
On 20 days April .....15,071 " " "
On 19 days May .....17,813 " " "
On 21 days June .....16,243 " " "

COMPLAINANT'S EXHIBIT No. 17, Witness Hawkins.

Docket No. 18672.
Exhibit No. 17.
Witness Hawkins.

THE FOLLOWING STEAMSHIP LINES RECEIVE AND DISCHARGE CARGO AT HOBOKEN PIERS WITH SIDING CONNECTIONS ON HOBOKEN MANUFACTURERS' R. R.

America France Line
American Diamond Lines
Bristol City Line
Ellerman's Wilson Line
Holland America Line
Lamport & Holt Line
North German Lloyd Line
Pan American Lines (Munson S/S Line Operators)
Norton Lilly & Co. (Steamers)
Scandinavian-American Line
U. S. Lines

COMPLAINANT'S EXHIBIT No. 18, Witness Hawkins.

Docket No. 18672.
Exhibit No. 18.
Witness Hawkins.

LIST OF INDUSTRIES, WAREHOUSES, Etc.
Located on
Hoboken Manufacturers' Railroad Company.

Company	Commodity
Bruce Flooring Corporation	Lumber
Campbell Stores, 6th & 14th Sts.	Storage (Bonded and Free)
Craft Stone Co.	Stone, etc.
Dykes Lumber Co.	Lumber
Elasticap Co., The	Storage Warehouses (Autos, etc.)
Factory Terminal Buildings— A, C, D, E & F	Miscellaneous Tenants
Fletcher Co., W. & A.	Marine Repairs, Boilermakers
Grant Co., F. W.	Department Stores—Warehouse
Horton, F. T.	Bird Seed, etc.
Ideal Furnace Co.	Furnaces
Jagels, Bellis & Co.	Coal
Lang Fish Distributing Co.	Ice, Fish, etc.
Lightfoot Schultz Co.	Soap, etc.
Mountain Ice Co.	Ice
Martini & Huneke Co. of America	Factory
National Box Co.	Boxes
Nungesser-Dickinson Seed Co.	Seeds
Public Service Electric Co.	Power Station
Shults Bread Co.	Bread, etc.

Company	Commodity
Staffords Sales Co.	Auto Bumpers
Tompkins Co., J. W.	Ship Chandlers
U. S. Testing Co.	Silk Storage
Vanderbilt Co., E. D.	Sand, Cement, Gravel, etc.
American Lead Pencil Co.	Storage
Bennett Box Co., R. C.	Boxes
Brightstar Battery Co.	Batteries, etc.
Carter Ludwig Co.	Lithograph Finishers
Corrugated Box Co.	Boxes
Day & Co., J. H.	Baker's Mach.
Dayton Rubber Manufacturing Co.	Rubber Tires, etc.
Derby & Co., P.	Chairs, etc.
Eclipse Machine Co.	Machinery
First Aid Specialty Co.	First Aid Material
Franklin Baker Co.	Cocoanut Products
Jewel Tea Co., Inc.	Tea, Spices, etc.
Jeandron, W. J.	Carbon Brushes
Lipton, Inc., Thos. J.	Teas, Coffee, etc.
McDonald Lyden Mfg. Co.	Table Tops
Mansell Hunt & Catty Co., Ltd.	Paper Notions
Schrenk & Co.	Glass
Triplex Safety Glass Co. of N. A.	Safety Glass
Western Union Telegraph Co.	Repair Material
Wilson Welder & Metals Co., Inc.	Welders, etc.

COMPLAINANT'S EXHIBIT NO. 19, Witness Hawkins

I. C. C. Docket No. 18672.
Exhibit No. 19.
Witness Hawkins.

TRANSCONTINENTAL SILK HANDLED BY HOBOKEN MANUFACTURERS' RAILROAD CO.

MONTH OF OCTOBER 1927.

Date	Initial	Car Number	Bales	Weight	Value	Ocean & Rail Freight Charges
Oct.						
3	CN	8669	382	52,021	$ 290,848	$ 6,922.83
		8676	387	51,672	300,007	6,975.72
		8627	395	54,312	293,171	7,332.12
7	CP	4909	343	47,691	155,078	6,438.20
		4900	416	56,302	328,902	7,400.77
		4923	275	37,975	200,385	5,126.62
		4926	420	56,134	308,684	7,579.09
		4928	411	57,269	299,914	7,731.31
8		5632	139)			
10		5596	173)	60,022	328,000	8,102.97
11		5623	122)			
8		6062	269	37,435	199,600	5,053.72
10		5675	200	27,323	145,867	3,688.60
		5618	155	21,313	119,979	2,877.35
		5601	295	39,336	220,400	5,310.36
		5641	295	41,571	221,750	5,612.08
		5698	280	39,367	138,150	5,314.54
		5640	290	39,226	220,800	5,295.51
13	AT&SF	4006	335	45,122	295,200	6,891.47
		4002	330	46,428	265,996	6,257.72
		4029	335	44,921	260,500	6,064.33
		4030	124	16,168	89,950	2,182.68
		4028	306	43,052	234,283	5,812.02
	NYC	5732	25	3,596	20,505	485.45
14	DLW	45967	281	39,453	201,096	5,326.15

Date	Initial	Car Number	Bales	Weight	Value	Ocean & Rail Freight Charges
		46032	285	38,265	214,700	5,931.07
		46995	214	26,672	152,935	3,590.72
		45432	275	38,227	190,648	5,160.64
		45815	141	19,633	99,420	2,630.45
15	CMSTP	40	280	38,829	208,658	5,241.91
		23	302	41,617	219,788	5,618.29
		10	280	38,083	209,263	5,141.20
		30	285	38,263	217,045	5,165.50
17	GN	244	308	43,536	218,500	5,877.36
18	NYC	5002	240	33,446	149,590	4,515.21
20	GN	247	313	43,681	217,130	5,896.93
		370	280	38,585	187,025	5,208.97
		242	300	39,906	221,100	5,387.31
		245	312	41,652	238,300	5,623.02
	CMSTP	1819	351	47,496	277,663	6,411.96
		1811	311	42,793	204,482	5,777.05
	CN	9759	221	29,476	164,880	3,979.25
	ARE	732	200	26,346	146,400	3,556.71
22	SP	6945	156	21,735	124,595	2,934.22
24	DLW	45846	365	51,213	216,487	6,913.75
		46037	358	48,202	260,780	6,487.27
		45087	200	29,439	160,949	3,977.26
		45443	388	54,284	139,661	7,328.34
25	UP	1746	10	1,420	8,150	191.72
26	GN	1959	240	33,658	182,000	4,543.83
	ARE	317	250	33,144	178,000	4,474.44
		1153	280	39,535	203,000	5,337.22
	CN	2021	248	33,964	194,674	4,585.14
	MKT	1221	265	37,329	197,537	5,039.41
	ARE	127	269	35,764	198,950	4,828.14
	CP	6090	358	50,534	240,521	6,822.09
	SP	6486	340	47,528	224,642	6,416.28
	NYC	5311	85	11,562	66,530	1,560.87

Date	Initial	Car Number	Bales	Weight	Value	Ocean & Rail Freight Charges
28	CP	4929	395	53,644	298,367	7,241.94
		4921	374	51,459	269,486	6,946.96
		4913	277	38,436	173,992	5,188.86
		4904	395	55,653	304,950	7,501.00
		4903	396	55,645	301,850	7,512.07
29	CMSTP	744	315	41,808	230,169	5,644.08
		825	378	52,991	283,000	7,153.78
		1810	380	50,868	285,528	6,867.18
31	ARE	230	110	15,083	78,300	2,036.20
	Truck √	NYC	90	12,868	61,921	1,737.18
			18,823	2,581,981	$13,560,631	$349,764.49

MONTH OF NOVEMBER, 1927.

Nov.						
1	DLW	46779	302	42,591	$ 219,500	$ 5,759.78
		46990	296	40,600	226,321	5,481.00
		46781	240	33,109	189,501	4,489.71
2	NYC	2854	210	29,380	148,900	3,966.30
3		Truck	10	1,415	8,150	191.02
7		"	110	16,744	71,604	2,069.56
9	ATSF	1619	216	30,215	154,047	4,152.91
	DLW	44968	250	34,012	191,091	4,591.61
	GN	252	296	41,387	211,159	5,588.28
		261	347	47,417	259,127	6,553.41
		264	305	42,827	230,700	5,781.81
		242	315	42,790	232,157	5,776.90
11	IC	4750	190	26,168	138,653	3,682.74
		4704	190	26,440	120,572	3,569.66
	ARE	55	185	25,611	131,000	3,457.52
12	CN	8670	395	55,651	297,500	7,512.99
		8664	427	60,205	282,250	7,154.67
		8676	340	47,913	244,450	6,458.90

Date	Initial	Car Number	Bales	Weight	Value	Ocean & Rail Freight Charges
		8669	345	45,808	253,500	6,184.08
		8627	340	45,838	235,450	6,188.13
		8686	331	44,151	232,705	5,968.91
		8684	305	42,782	236,906	6,748.79
		8652	356	48,673	262,700	6,570.85
	NYC	Truck	66	9,223	46,500	1,245.11
14		5317	100	14,282	64,219	1,926.68
16	CMSTP	1814	415	56,200	377,600	7,587.03
		1803	419	58,847	269,660	7,944.51
		830	425	57,350	310,350	7,742.19
		1819	388	51,942	276,369	6,712.54
18	CP	6960	253	35,347	191,800	4,773.43
		6968	270	38,047	208,300	5,136.54
19		4915	410	54,624	300,700	7,374.24
		4003	425	59,565	318,200	8,041.52
		4904	416	58,939	312,950	7,956.30
		4919	414	57,078	288,150	7,716.57
		4901	385	51,202	283,800	6,912.72
		4905	397	55,649	303,745	7,161.15
		4927	358	50,616	235,500	6,930.20
23		6489	160	21,329	112,991	2,879.58
25	NYC	Truck	30	4,130	20,653	557.55
	GN	244	299	47,475	217,593	5,687.66
		240	285	40,348	205,751	5,447.17
		265	315	43,473	233,853	5,708.21
		261	322	45,164	227,274	6,097.29
		258	325	45,801	227,500	6,183.31
26		259	316	43,478	225,564	5,879.59
		253	360	47,822	260,200	6,455.97
		282	350	49,635	255,850	6,700.90
		241	305	41,528	211,466	5,606.39
		316	334	47,050	249,250	6,352.06

Complainant's Exhibit No. 19, Witness Hawkins

Date	Car Initial	Car Number	Bales	Weight	Value	Ocean & R... Freight Ch...
		252	339	47,516	245,000	6,414
	GN	371	275	36,666	201,400	4,949
	NYC	Truck V	106	14,590	72,934	1,750
	SP	6931	75	10,057	51,530	1,357
			15,638	2,166,700	$11,404,805	$291,097

MONTH OF DECEMBER, 1927.

Dec.						
1	CMSTP	821	30	4,217	$ 18,780	$ 569
	NP	1802	240	32,588	105,294	4,399
	GN	319	240	31,964	173,000	4,315
	GN	392	277	39,012	206,750	5,266
	GN	279	272	36,568	199,100	4,936
	GN	238	270	35,732	193,506	4,823
	GN	243	230	31,367	167,700	4,234
	GN	329	244	33,285	175,448	4,503
	GN	388	273	36,631	191,057	4,945
	Truck V	NYC	70	9,636	44,313	1,300
	CN	8684	375	50,601	275,254	6,831
	CN	8624	380	50,919	268,316	6,874
	CN	8694	371	52,468	266,260	7,083
	CN	8704	369	50,594	248,928	6,830
	CP	4900	385	51,329	267,938	6,929
	CP	4909	345	45,900	254,100	6,196
	CP	4918	370	50,017	255,492	6,753
	CP	4902	380	50,534	274,200	6,822
	SP	6409	238	33,172	168,650	4,478
	CP	4923	416	55,782	297,697	7,420
	CP	4922	414	57,117	294,500	7,768
	CP	4928	300	40,163	200,972	5,423
	CP	4901	394	54,387	238,115	7,345
	WP	107	200	27,252	145,940	3,679

Complainant's Exhibit No. 19, Witness Hoskins

Date	Car Initial	Number	Bales	Weight	Value	Ocean & Rail Freight Charges
	WP	109	290	38,298	217,060	5,170.22
15	CMSTP	46	264	30,304	192,000	4,191.04
	CMSTP	25	275	39,246	199,850	5,297.11
	CMSTP	810	425	56,992	315,300	7,793.83
	CMSTP	1809	397	53,473	280,988	7,218.86
16	ARE	51	110	15,160	72,500	2,046.60
17	NP	2200	290	38,958	202,200	5,257.32
	NP	1862	255	34,880	167,117	4,709.80
	SL-SF	5014	310	41,210	224,600	5,563.85
	NP	1835	195	26,245	144,154	3,[illegible]8.07
	NP	2249	340	45,406	253,459	6,129.81
	DLW	46238	80	11,200	58,800	1,512.00
19	GN	1955	272	36,416	203,106	4,906.16
	ARE	69	271	37,708	189,550	5,069.56
	GN	1961	270	37,376	182,900	5,045.75
	GN	2022	345	46,691	254,000	6,303.20
	GN	2083	280	37,699	198,300	5,069.35
	GN	1965	275	37,952	195,744	5,123.52
20	NYC	5248	130	18,052	90,185	2,437.02
	DLW	45253	40	5,773	29,800	779.36
	Truck	NYC	30	4,190	22,350	565.75
21	GN	1902	340	46,608	232,846	6,292.08
22	DLW	45772	361	49,382	252,635	6,666.57
	DLW	45805	218	30,239	150,530	4,082.26
	CMSTP	22	276	38,910	193,000	5,252.65
	IC	4496	264	37,023	185,300	4,998.10
	DLW	46236	320	43,880	215,512	5,923.90
23	CP	5649	295	40,346	211,694	5,446.71
	CP	5620	287	39,668	186,199	5,355.18
	CP	5686	300	41,440	195,533	5,594.40
	ATSF	4004	95	12,786	66,042	1,724.89
			14,983	2,034,746	$10,569,498	$274,874.46

COMPLAINANT'S EXHIBIT NO. 20, Witness Hawkins

Docket No. 18672.
Exhibit No. 20.
Witness Hawkins.

SUMMARY OF EXHIBIT No. 19.

	Number of Cars	Bales	Weight	Value	Ocean & Rail Charges
October	67	18733	2,569,113	$13,498,710	$348,027.31
November ..	49	15412	2,135,188	11,257,898	287,034.69
December ..	53	14883	2,020,920	10,492,825	273,007.85
	169	49028	6,725,221	$35,249,433	$908,069.85

Average number of Bales per Car 290
Average Weight per Car 40,000 pounds
Average Weight per Bale 137.2 pounds
Average Value per pound $5.24

Docket No. 18672.
Exhibit No. 21.
Witness Hawkins.

COMPLAINANT'S EXHIBIT NO. 21, Witness Hawkins

TRANSCONTINENTAL SILK HANDLED BY HOBOKEN MANUFACTURERS' RAILROAD COMPANY

IN OCTOBER, 1927.

Date of Arrival	Billed Date	From	Car No.		Route	No. of Shipments	No. of Bales	Weight	Freight Charges
10/3/27	9/27/27	Vancouver, B. C.	CN	8669	1	15	382	52021	$ 4,681.89
"	"	"	CN	8676	1	16	387	51672	4,650.48
"	"	"	CN	8627	1	9	395	54312	4,888.08
10/3/27	9/29/27	San Francisco, Cal.	ATSF	4096	2	6	335	45122	4,060.98
"	"	"	ATSF	4002	2	15	330	46428	4,178.52
"	"	"	ATSF	4029	2	11	335	44921	4,042.89
10/4/27	"	"	ATSF	4030	2	7	124	16168	1,455.12
10/3/27	"	"	ATSF	4028	2	11	306	43052	3,874.68
10/7/27	10/2/27	Vancouver, B. C.	CP	4909	3	14	343	47691	4,292.19
"	"	"	CP	4900	3	8	415	56302	5,067.18
"	"	"	CP	4923	3	10	275	37975	3,417.75
"	"	"	CP	4926	3	14	420	56134	5,052.96
"	"	"	CP	4928	3	14	411	57269	5,154.21
10/8/27	"	San Francisco, Cal.	CP	6062	4	8	269	37435	3,369.15
"	9/21/27	Vancouver, B. C.	CP	5632	3	9	139	60022	5,401.98
10/10/27	10/4/27	"	CP	5675	3	13	200	27323	2,459.07
"	"	"	CP	5618	3	8	155	21313	1,918.17
"	"	"	CP	5601	3	8	295	39336	3,540.24
"	"	"	CP	5641	3	4	295	41571	3,741.39
"	"	"	CP	5698	3	2	280	39367	3,543.03
"	"	"	CP	5640	3	6	290	39226	3,530.34
10/13/27	10/6/27	San Francisco, Cal.	NYC	5732	5	4	25	3596	323.64
10/14/27	10/10/27	Seattle Whf., Wash.	D	45967	6	3	281	39453	3,550.77
"	"	"	D	46032	6	3	285	38265	3,443.85
"	"	"	DLW	46995	6	9	214	26672	2,400.48
"	"	"	D	45432	6	8	275	38227	3,440.43
"	"	"	D	45815	6	12	141	19633	1,766.97
10/15/27	10/11/27	"	CMSTP	40	7	11	280	38829	3,494.61
"	"	"	CMSTP	23	7	8	302	41647	3,745.53
"	"	"	CMSTP	10	7	6	280	38083	3,427.47
"	"	"	CMSTP	30	7	9	285	38263	3,443.67
10/17/27	10/12/27	"	GN	244	8	3	308	43536	3,918.24
10/18/27	"	"	NYC	5002	8	4	240	33446	3,010.14
10/20/27	10/15/27	"	GN	247	9	12	313	43681	3,931.29

Date of Arrival	Billed Date	From	Car No.		Route	No. of Shipments	No. of Bales	Weight	Freight Charges
10/20/27	10/15/27	Seattle Whf., Wash.	GN	370	9	11	280	38585	3,472.65
"	"	"	GN	242	9	10	300	39906	3,591.54
"	"	"	GN	245	9	5	312	41652	3,748.68
"	10/16/27	Seattle, Wash.	CMSTP	1819	10	11	351	47496	4,274.64
"	"	"	CMSTP	1811	10	8	311	42793	3,851.37
"	10/17/27	"	CNW	8759	11	10	221	29476	2,652.84
"	"	"	ARE	732	11	2	200	26346	2,371.14
10/22/27	"	San Francisco, Cal.	SP	6945	12	10	156	21735	1,956.15
10/24/27	10/19/27	Vancouver, B. C.	DLW	45846	13	12	365	51213	4,609.17
"	"	"	DLW	46037	13	15	358	48202	4,338.18
"	"	"	DLW	45087	13	7	220	29439	2,649.51
"	"	"	DLW	45443	13	5	388	54284	4,885.56
10/25/27	10/17/27	Seattle, Wash.	UP	1746	14	1	10	1420	127.80
10/26/27	10/22/27	Seattle Dock, Wash.	GN	1959	15	3	240	33658	3,029.22
"	"	"	ARE	317	15	2	250	33144	2,982.96
"	"	"	ARE	1153	15	3	280	39533	3,558.15
"	"	"	GN	2021	15	6	248	33964	3,056.76
"	"	"	MKT	1221	15	6	265	37329	3,359.61
"	"	"	ARE	127	15	15	269	35764	3,218.76
"	10/21/27	San Francisco, Cal.	CP	6090	16	3	358	50534	4,548.06
"	"	"	SP	6486	16	2	340	47528	4,277.52
"	10/20/27	"	NYC	5311	5	5	85	11562	1,040.58
10/28/27	10/23/27	Vancouver Whf., B. C.	CP	4919	3	21	395	53644	4,827.96
"	"	"	CP	4921	3	13	374	51459	4,631.31
"	"	"	CP	4913	3	5	277	38436	3,459.24
"	"	"	CP	4904	3	2	395	55653	5,008.77
"	"	"	CP	4903	3	4	396	55645	5,008.05
10/29/27	10/25/27	Seattle, Wash.	CMSTP	744	17	12	315	41808	3,762.72
"	"	"	CMSTP	825	17	9	378	52991	4,769.19
"	"	"	CMSTP	380	17	12	380	50868	4,578.12
10/31/27	10/24/27	"	ARE	230	18	3	110	15083	1,357.47
			Total			533	18437	2569110	$231,220.17

Explanation of Route Nos.

1. CNR-Erie-H. S. Rd.
2. ATSF-PRR-Erie-H. S. Rd.
3. CP-NYC-H S. Rd.
4. SP-CNW-NYC-H. S. Rd.
5. SP-UP-CMSTP-PRR-Erie-H. S. Rd.
6. OWRR&N-OSL-UP-CNW-Wab-DLW-H. S. Rd.
7. CMSTP-NKP-DLW-H. S. Rd.
8. GN-CBQ-PRR-Erie-H. S. Rd.
9. GN-CBQ-MC-NYC-H. S. Rd.
10. CMSTP-Erie-H. S. Rd.
11. O&WRR&N-OSL-UP-CGW-PRR-Erie-H. S. Rd.
12. SP-UP-CRIP-NYC-H. S. Rd.
13. Can. Nat.-DLW-H. S. Rd.
14. O&WRRN-OSL-UP-CNW-PRR-Erie-H. S. Rd.
15. GN-CBQ-NKP-Erie-H. S. Rd.
16. SP-UP-CMSTP-NYC-H. S. Rd.
17. CMSTP-Penn-Erie-H. S. Rd.
18. CMSTP-NYC-H. S. Rd.

TRANSCONTINENTAL SILK HANDLED BY HOBOKEN MANUFACTURERS' RAILROAD COMPANY

MONTH OF NOVEMBER, 1927.

Date of Arrival	Billed Date	From	Car No.		Route	No. of Shipments	No. of Bales	Weight	Freight Charges
11/1/27	10/24/27	Seattle, Wash.	Truck	NYC	1	5	91	12868	$ 1,158.12
"	10/27/27	San Francisco, Cal.	DLW	46779	2	3	302	42591	3,833.19
"	"	"	DLW	46990	2	11	296	40600	3,654.00
"	"	"	DLW	46781	2	12	240	33109	2,979.81
11/2/27	10/28/27	"	NYC	2845	3	4	220	30795	2,771.55
11/3/27	10/27/27	Seattle, Wash.	Truck	NYC	4	2	110	16744	1,506.96
11/9/27	11/3/27	San Francisco, Cal.	ATSF	1619	5	9	216	30215	2,719.35
"	11/5/27	Yokohoma	D	46968	6	11	250	34012	3,061.08
"	"	"	GN	252	6	5	299	41387	3,724.83
"	"	"	GN	261	6	11	347	47417	4,267.53
"	"	"	GN	264	6	4	305	42827	3,854.43
"	"	"	GN	242	6	12	315	42790	3,851.10
11/11/27	11/7/27	Seattle, Wash.	IC	4750	7	10	196	26168	2,355.12
"	"	"	IC	4704	7	7	196	26440	2,379.60
"	"	"	ARE	55	7	4	185	25611	2,304.99
11/12/27	11/8/27	Vancouver, B. C.	CN	8670	8	2	395	55651	5,008.59
"	"	"	CN	8664	8	4	427	60205	5,418.45
"	"	"	CN	8676	8	8	340	47913	4,312.17
"	"	"	CN	8669	8	6	345	45808	4,122.72
"	"	"	CN	8627	8	7	340	45838	4,125.42
"	"	"	CN	8626	8	5	331	44151	3,973.59
"	"	"	CN	8684	8	7	305	42782	3,850.38
"	"	"	CN	8652	8	8	356	48673	4,380.57
"	11/5/27	San Francisco, Cal.	Truck	NYC	3	1	66	9223	830.07
11/14/27	11/7/27	Vancouver, B. C.	NYC	5317	9	3	100	14282	1,285.38
11/16/27	11/12/27	Seattle, Wash.	CMSTP	1814	10	8	415	56200	5,058.00
"	"	"	CMSTP	1803	10	7	419	58847	5,296.23
"	"	"	CMSTP	830	10	10	425	57350	5,161.50
"	"	"	CMSTP	1819	10	14	388	51942	4,674.78
11/18/27	11/14/27	San Francisco, Cal.	CP	6960	11	6	253	35347	3,181.23
"	"	"	CP	6968	11	4	270	38047	3,424.23

Date of Arrival	Billed Date	From	Car	No.	Route	No. of Shipments	No. of Bales	Weight	Freight Charges
11/19/27	11/14/27	Vancouver, B. C.	CP	4915	9	3	410	54624	4,916.16
"	"	"	CP	4903	9	5	425	59565	5,360.85
"	"	"	CP	4904	9	3	416	58939	5,304.51
"	"	"	CP	4919	9	18	414	57078	5,137.02
"	"	"	CP	4901	9	8	385	51202	4,608.18
"	"	"	CP	4905	9	11	397	55649	5,008.41
"	"	"	CP	4927	9	5	358	50616	4,555.44
11/23/27	11/17/27	San Francisco, Cal.	CP	6489	12	9	160	21329	1,919.61
11/25/27	11/21/27	"	Truck	NYC	5	1	30	4130	371.70
"	"	Seattle, Wash.	GN	244	13	14	299	47475	4,272.75
"	"	"	GN	240	13	8	285	40348	3,631.32
"	"	"	GN	265	13	8	315	43473	3,912.57
"	"	"	GN	261	13	7	322	45164	4,064.76
"	"	"	GN	258	13	2	325	45801	4,122.09
11/26/27	11/21/27	"	GN	259	13	14	316	43478	3,913.02
"	"	"	GN	253	13	3	360	47822	4,303.98
"	"	"	GN	282	13	3	350	49635	4,467.15
"	"	"	GN	241	13	6	305	41528	3,737.52
"	"	"	GN	316	13	5	334	47050	4,234.50
"	"	"	GN	252	13	2	339	47516	4,276.44
"	"	"	GN	275	13	5	275	36666	3,299.94
11/28/27	11/22/27	San Francisco, Cal.	Truck	NYC	3	3	106	14590	1,313.10
11/29/27	11/25/27	"	SP	6931	14	6	75	10057	905.13
			Total			359	15732	2179568	$196,161.12

Explanation of Routes:

1. CMSTP-NYC-H.S.Rd.
2. WP-UP-CBQ-NKP-DLW-H.S.Rd.
3. SP-UP-CMSTP-NYC-H.S.Rd.
4. GN-CBQ-MC-NYC-H.S.Rd.
5. ATSF-NYC-H.S.Rd.
6. GN-CBQ-Wab-DLW-H.S.Rd.
7. NP-CBQ-BO-H.S.Rd.
8. Can.Nat.-NYC-H.S.Rd.
9. CP-NYC-H.S.Rd.
10. CMSTP-Erie-H.S.Rd.
11. SP-IC-BO-H.S.Rd.
12. SP-UP-CMSTP-Penn-Erie-H.S.Rd.
13. GN-CBQ-Penn-Erie-H.S.Rd.
14. SP-UP-CNW-NYC-H.S.Rd.

TRANSCONTINENTAL SILK HANDLED BY HOBOKEN MANUFACTURERS' RAILROAD COMPANY

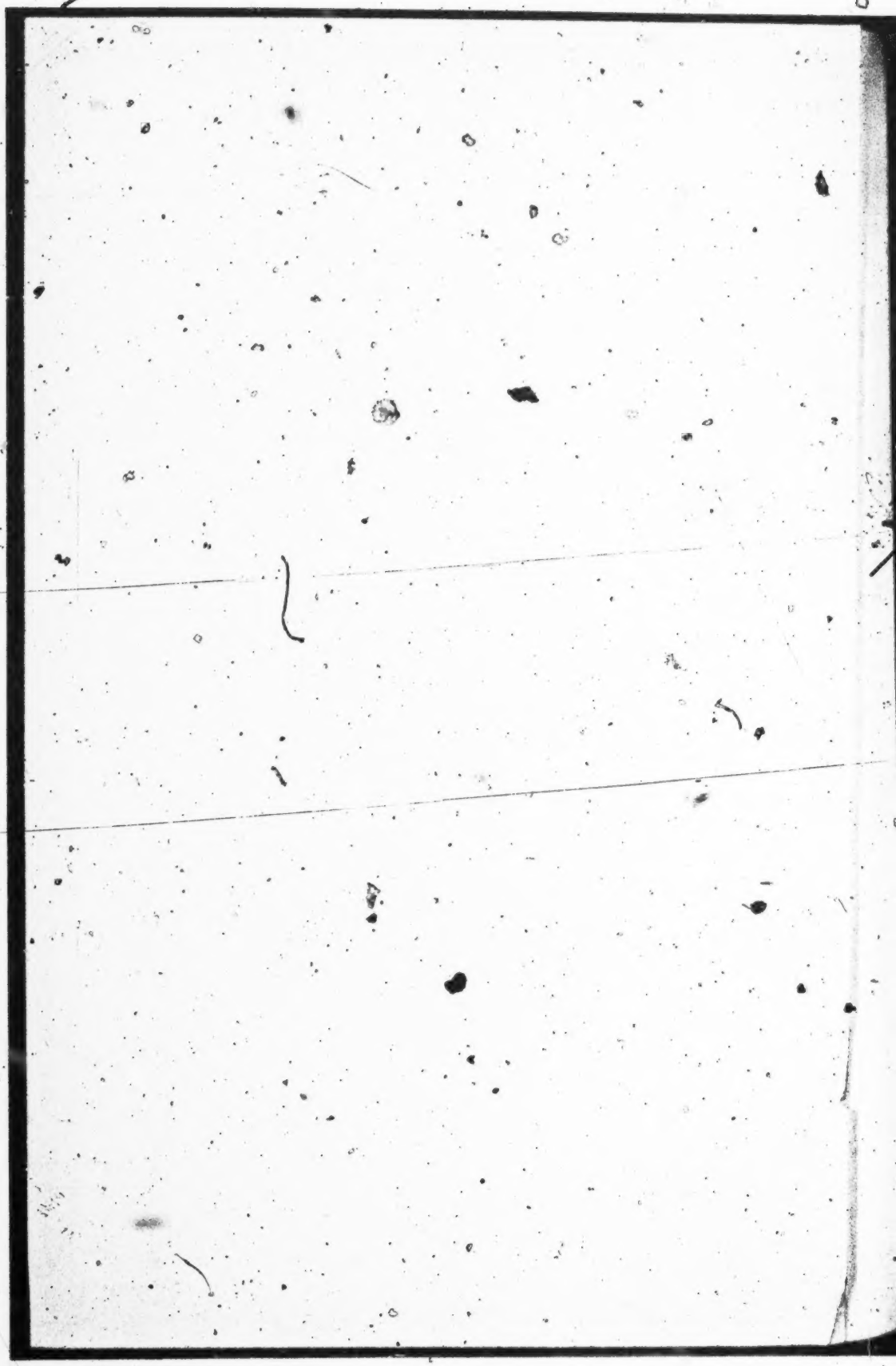
MONTH OF DECEMBER, 1927.

Date of Arrival	Billed Date	From	Car No.		Route	No. of Shipments	No. of Bales	Weight	Freight Charges
12/1/27	11/25/27	Seattle, Wash.	CMSTP	821	1	1	30	4217	$ 379.53
12/6/27	12/2/27	"	NP	1802	2	3	240	32588	2,932.92
"	"	"	GN	319	3	2	240	31964	2,876.76
"	"	"	GN	392	3	3	277	39012	3,511.08
"	"	"	GN	279	3	3	272	36568	3,291.12
"	"	"	GN	238	3	3	270	35732	3,215.88
"	"	"	GN	243	3	4	230	31367	2,823.03
"	"	"	GN	329	3	10	244	33285	2,995.65
"	"	"	GN	388	3	8	273	36631	3,296.79
12/7/27	12/1/27	San Francisco, Cal.	Truck	NYC	4	4	70	9636	867.24
12/6/27	12/2/27	Vancouver, B. C.	CN	8684	5	12	375	50601	4,554.09
"	"	"	CN	8624	5	5	380	50919	4,582.71
"	"	"	CN	8694	5	9	371	52468	4,722.12
"	"	"	CN	8704	5	13	369	50594	4,553.46
12/8/27	12/4/27	"	CP	4900	6	17	385	51329	4,619.61
"	"	"	CP	4909	6	5	345	45900	4,131.00
"	"	"	CP	4918	6	11	370	50017	4,501.53
"	"	"	CP	4902	6	2	380	50534	4,548.06
12/12/27	12/5/27	San Francisco, Cal.	SP	6409	6	5	238	33172	2,985.48
"	"	Vancouver, B. C.	CP	4923	6	10	416	55782	5,020.38
"	"	"	CP	4922	6	10	414	57117	5,140.53
"	"	"	CP	4928	6	11	300	40163	3,614.67
"	"	"	CP	4901	6	11	394	54387	4,894.83
12/13/27	12/9/27	San Francisco, Cal.	WP	107	7	8	200	27252	2,452.68
"	"	"	WP	109	7	4	290	38298	3,446.82
12/15/27	12/11/27	Seattle, Wash.	CMSTP	46	8	3	264	30304	2,727.36
"	"	"	CMSTP	25	8	2	275	39246	3,532.14
"	"	"	CMSTP	810	8	4	425	56992	5,129.28
"	"	"	CMSTP	1809	8	20	397	53473	4,812.57
12/16/27	12/12/27	"	ARE	51	9	2	110	15160	1,364.40
12/17/27	"	"	NP	2200	10	9	290	38958	3,506.22
"	"	"	NP	1862	10	7	255	34880	3,139.20

Date of Arrival	Billed Date	From	Car No.		Route	No. of Shipments	No. of Bales	Weight	Freight Charges
12/17/27	12/12/27	Seattle, Wash.	SL-SF	5014	10	4	310	41210	3,708.90
"	"	"	NP	1835	10	13	195	26245	2,362.05
"	"	"	NP	2249	10	7	340	45406	4,086.54
"	"	"	DLW	46238	10	1	80	11200	1,008.00
12/19/27	12/15/27	"	GN	1955	11	8	272	36416	3,277.44
"	"	"	ARE	69	11	3	271	37708	3,393.72
"	"	"	GN	1961	11	3	270	37376	3,363.84
"	"	"	GN	2022	11	6	345	46691	4,202.19
"	"	"	GN	2083	11	2	280	37699	3,392.91
"	"	"	GN	1965	11	13	275	37952	3,415.68
12/20/27	"	San Francisco, Cal.	NYC	5248	12	6	130	18052	1,624.68
"	12/13/27	Vancouver, B. C.	DLW	45253	13	1	40	5773	519.57
"	"	"	NYC	Truck	6	1	30	4190	377.10
12/23/27	12/19/27	Seattle, Wash.	GN	1902	14	12	340	46608	4,194.72
12/27/27	12/20/27	Vancouver, B. C.	DLW	45772	13	16	361	49382	4,444.38
"	"	"	DLW	45805	13	5	218	30239	2,721.51
"	12/23/27	Seattle, Wash.	CMSTP	22	15	2	276	38910	3,501.90
"	"	"	IC	4406	15	3	264	37023	3,332.07
"	"	"	DLW	46236	15	15	320	43830	3,944.70
12/30/27	12/25/27	Vancouver, B. C.	CP	5649	6	14	295	40346	3,631.14
"	"	"	CP	5620	6	7	287	39668	3,570.12
"	"	"	CP	5686	6	10	300	41440	3,729.60
12/31/27	12/27/27	San Francisco, Cal.	ATSF	4004	16	6	93	12786	1,150.74
			Total			379	14983	2034696	$183,122.64

Explanation of Routes:

1. CMSTP-Penn-Erie-H.S.Rd.
2. NP-CBQ-Erie-H.S.Rd.
3. GN-CBQ-MC-NYC-H.S.Rd.
4. SP-UP-CMSTP-NYC-H.S.Rd.
5. CN-Erie-H.S.Rd.
6. CP-NCY-H.S.Rd.
7. WP-UP-CRIP-NKP-Erie-H.S.Rd.
8. CMSTP-BO-CNJ-H.S.Rd.
9. OWRR&N-OSL-UP-CNW-Wab-DLW-H.S.Rd.
10. CMSTP-MC-DLW-H.S.Rd.
11. GN-CBQ-BO-H.S.Rd.
12. SP-UP-CMSTP-Penn-Erie-H.S.Rd.
13. CN-DLW-H.S.Rd.
14. GN-CSTPMO-CNW-Erie-H.S.Rd.
15. CMSTP-NKP-DLW-H.S.Rd.
16. ATSF-Erie-H.S.Rd.



COMPLAINANT'S EXHIBIT No. 22, Witness Hawkins.

Docket No. 18672.
Exhibit No. 22.
Witness Hawkins.

SUMMARY OF EXHIBIT No. 21.

	Number of Cars	Number of Consignments	Number of Bales	Weight	Rail Freight Charges
October	65	533	18437	2,569,110	$231,220.17
November	49	347	15329	2,122,003	190,981.17
December	53	374	14883	2,020,870	181,878.30
	167	1254	48649	6,711,983	$604,079.64

Average number Consignments per Car 7.5.
Average number of Bales per Consignment 38.8.
Average Weight per Car—Pounds 40,192.
Average Freight Charges per Car $3,617.24.

COMPLAINANT'S EXHIBIT No. 23, Witness Hawkins.

MILES AND ROUTES FROM PACIFIC PORTS TO HOBOKEN, N. J.

Docket No. 18672.
Exhibit No. 23.
Witness Hawkins.

From	Line	Route	Miles—Total to Chicago	East	Grand Total
Seattle	1	GN—Mian'lis (1774) CB&Q—Chic. (441) NYC&StL—Buffalo (523) Erie—(425)	2215	948	3163
	2	GN " (1774) " " (441) NYC—(960)	2215	960	3175
	3	GN " (1774) " " (441) PRR—(908)	2215	908	3123
	4	GN " (1774) " " (441) Erie—(998)	2215	998	3215
	5	GN " (1774) " " (441) GT—Buff. (482) DL&W—(396)	2215	878	3092
	6	GN " (1774) CGW " (435) Erie—(998)	2209	998	3207
	7	NP " (1904) CB&Q " (441) MC—Buff. (535) NYC—(438)	2345	973	3318
	8	NP " (1904) CB&Q " (441) NYC—(960)	2345	960	3305
	9	NP " (1904) CM&StP " (421) Wab—Buff. (513) DL&W—(396)	2325	909	3234
	10	NP " (1904) C&NW " (421) B&O—(1014)	2325	1014	3339
	11	UP—Omaha (1967) CM&StP " (487) GT—Buff. (482) NYC—(438)	2454	920	3374
	12	UP " (1967) C&NW " (488) Erie—(998)	2455	998	3453
	13	UP " (1967) " " (488) B&O—(1014)	2455	1014	3469
	14	UP " (1967) IC " (515) PRR—(908)	2482	908	3390
	15	CM&StP—Chicago (2189) PRR—(908)	2189	908	3097
	16	" " (2189) GT—Buffalo (482) NYC—(438)	2189	920	3109
	17	" " (2189) MC—Buffalo (535) NYC—(438)	2189	973	3162
	18	" " (2189) B&O—(1014)	2189	1014	3203
	19	" " (2189) Erie—(998)	2189	998	3187
		Average	2285	958	3243
Frisco	20	WP—Salt Lake City (928) UP—Omaha (1027) CRI&P—Chic. (503) NYC—(960)	2458	960	3414
	21	WP " (928) UP " (1027) C&NW—Chic. (488) NYC—(960)	2443	960	3403
	22	WP " (928) UP " (1027) CM&StP " (487) PRR—(908)	2442	908	3350
	23	SP—Ogden (783) UP—Omaha (998) C&NW—Chicago (488) PRR—(908)	2269	908	3177
	24	SP " (783) UP " (998) CM&StP " (487) Erie—(998)	2268	998	3266
	25	SP " (783) UP " (998) " " (487) PRR—(908)	2268	908	3176
	26	SP " (783) UP " (998) " " (487) NYC—(960)	2268	960	3228
	27	SP " (783) UP " (998) CGW " (508) B&O—(1014)	2289	1014	3303
Oakland	28	AT&SF—Chicago (2553) PRR—(908)	2553	908	3461
	29	" " (2553) MC—Buffalo (535) NYC—(438)	2553	973	3526
	30	" " (2553) NYC—(960)	2553	960	3513
		Average	2397	951	3347
Vancouver	31	CP—Ogdensburg (2827) NYC—(375)			3202
	32	CN—Buffalo (2966) NYC—(438)			3404
	33	CN " (2966) DL&W—(396)			3362

MILES AND ROUTES FROM PACIFIC PORTS TO HOBOKEN, N. J.

Docket No. 18672.
Exhibit No. 23.
Witness Hawkins.

From	Line	Route	Miles—Total to Chicago	East	Grand Total
Seattle	1	GN—Minn'lis (1774) CB&Q—Chic. (441) NYC&StL—Buffalo (523) Erie—(425)	2215	948	3163
	2	GN " (1774) " " (441) NYC—(960)	2215	960	3175
	3	GN " (1774) " " (441) PRR—(908)	2215	908	3123
	4	GN " (1774) " " (441) Erie—(998)	2215	998	3213
	5	GN " (1774) " " (441) GT—Buff. (482) DL&W—(396)	2215	878	3092
	6	GN " (1774) CGW " (435) Erie—(998)	2209	998	3207
	7	NP " (1904) CB&Q " (441) MC—Buff. (535) NYC—(438)	2345	973	3318
	8	NP " (1904) CB&Q " (441) NYC—(960)	2345	960	3305
	9	NP " (1904) CM&StP " (421) Wab—Buff. (513) DL&W—(396)	2325	909	3234
	10	NP " (1904) C&NW " (421) B&O—(1014)	2325	1014	3339
	11	UP—Omaha (1967) CM&StP " (487) GT—Buff. (482) NYC—(438)	2454	920	3374
	12	UP " (1967) C&NW " (488) Erie—(998)	2455	998	3453
	13	UP " (1967) " " (488) B&O—(1014)	2455	1014	3469
	14	UP " (1967) IC " (515) PRR—(908)	2482	908	3390
	15	CM&StP—Chicago (2189) PRR—(908)	2189	908	3097
	16	" " (2189) GT—Buffalo (482) NYC—(438)	2189	920	3109
	17	" " (2189) MC—Buffalo (535) NYC—(438)	2189	973	3162
	18	" " (2189) B&O—(1014)	2189	1014	3203
	19	" " (2189) Erie—(998)	2189	998	3187
		Average	2285	958	3243
Frisco	20	WP—Salt Lake City (928) UP—Omaha (1027) CRI&P—Chic. (503) NYC—(960)	2458	960	3414
	21	WP " (928) UP " (1027) C&NW—Chic. (488) NYC—(960)	2443	960	3403
	22	WP " (928) UP " (1027) CM&StP " (487) PRR—(908)	2442	908	3350
	23	SP—Ogden (783) UP—Omaha (998) C&NW—Chicago (488) PRR—(908)	2269	908	3177
	24	SP " (783) UP " (998) CM&StP " (487) Erie—(998)	2268	998	3266
	25	SP " (783) UP " (998) " " (487) PRR—(908)	2268	908	3176
	26	SP " (783) UP " (998) " " (487) NYC—(960)	2268	960	3228
	27	SP " (783) UP " (998) CGW " (508) B&O—(1014)	2289	1014	3303
Oakland	28	AT&SF—Chicago (2553) PRR—(908)	2553	908	3461
	29	" " (2553) MC—Buffalo (535) NYC—(438)	2553	973	3526
	30	" " (2553) NYC—(960)	2553	960	3513
		Average	2397	951	3347
Vancouver	31	CP—Ogdensburg (2827) NYC—(375)			3202
	32	CN—Buffalo (2966) NYC—(438)			3404
	33	CN " (966) DL&W—(396)			3362
	34	CN " ( ) Erie—(425)			3391
		Average			3340

COMPLAINANT'S EXHIBIT No. 24, Witness Hawkins.

Docket No. 18672.
Exhibit No. 24.
Witness Hawkins.

STATEMENT OF CARLOAD SHIPMENTS OF TRANSCONTINENTAL SILK.

JANUARY, 1928.

Line	Port	Route	Cars Hob.	Cars NY.	Cars Others	Depart.	Dely. to HS.	Hours in Transit Hrs.	Hours in Transit Min.
1	San Francisco	SP-UP-CM&StP-NYC	..	1	..	4.27P—12/29	.....	...	..
2	Seattle	GN-CB&Q-NP-Erie	5	5	2	12.43P—12/29	7.00A—1/3	114	17
3	San Francisco	WP-UP-RI-DL&W	1	3	1	6.45P—1/1	3.00P—1/5	92	15
4	Seattle	NP-CB&Q-NYC	2	3	3	3.25P—1/3	5.20A—1/7	35	55
5	Seattle	UP-CM&StP-GT-NYC	1	4	1	3.38P—1/5	9.13A—1/9	89	35
6	Vancouver	CP-NYC	9	3	..	12.02P—1/5	5.15P—1/9	101	13
7	San Francisco	SP-UP-C&NW-PRR	3	2	1	1.32P—1/6	9.30A—1/10	91	58
8	Seattle	GN-CB&Q-NYC	1	..	..	9.15P—1/6	8.20P—1/11	119	05
9	Seattle	GN-CB&Q-PRR	7	3	3	10.38P—1/10	11.30A—1/14	84	52
10	Vancouver	CN-Buff.-NYC	4	5	2	5.30P—1/11	3.20A—1/16	105	50
11	San Francisco	AT&SF-PRR	1	1	2	12.30P—1/12	11.15A—1/16	94	45
12	Seattle	CM&StP-PRR	5	5	1	12.51A—1/13	3.15P—1/16	74	24
13	San Francisco	WP-UP-C&NW-NYC	1	1	..	8.00P—1/14	6.50A—1/19	106	50
14	Seattle	GN-CGW-Erie	1	1	5	5.55P—1/16	8.10A—1/20	86	15
15	San Francisco	SP-UP-CM&StP-NYC	2	..	..	4.27P—1/15	8.43P—1/20	124	16
16	Seattle	NP-C&NW-B&O	1	4	..	5.15A—1/17	6.30A—1/23	145	15
17	Seattle	CM&StP-Erie	4	4	2	9.04P—1/21	2.50P—1/25	89	44
18	Vancouver	CP-NYC	4	6	4	10.34P—1/22	5.57A—1/27	103	23
19	Seattle	SP-UP-CM&StP-PRR	..	1	1	4.27P—1/26	.....	...	..
20	Seattle	GN-CB&Q-Erie	4	4	3	11.59P—1/26	1.55P—1/30	85	56
21	Seattle	UP-C&NW-B&O	4	2	6	8.20P—1/30	10.45A—2/3	86	25
22	Vancouver	CN-Erie	4	3	3	4.28P—1/31	7.00A—2/6	134	37
23	Vancouver	CP-NYC	2	..	1	11.45A—1/31	5.32A—2/5	113	47
			66	61	41			2130	37
		21 Trains—Average Time						101	27

STATEMENT OF CARLOAD SHIPMENTS OF TRANSCONTINENTAL SILK.

FEBRUARY, 1928.

Line	Port	Route	Cars Hob.	Cars NY.	Cars Others	Depart.	Dely. to HS.	Hours in Transit Hrs.	Hours in Transit Min.
24	Seattle	UP-IC-PRR	1	4	1	6.30P—2/3	11.00A—2/7	88	30
25	San Francisco	AT&SF-NC-NYC	1	4	1	9.31P—2/4	2.43P—2/8	89	12
26	Vancouver	CP-NYC	4	2	..	10.35A—2/4	10.45A—2/8	96	10
27	Seattle	GN-CB&Q-GT-DL&W	4	3	3	6.02P—2/9	5.42A—2/13	83	40
28	San Francisco	AT&SF-NYC	1	2	..	4.00P—2/9	9.12A—2/13	89	12
29	Seattle	NP-CB&Q-MC-NYC	2	3	..	7.15P—2/10	5.34A—2/14	82	19
30	Vancouver	CP-NYC	3	5	..	4.07A—2/13	6.13A—2/17	98	06
31	Seattle	GN-CB&Q-Erie	4	4	1	6.40P—2/13	5.45A—2/17	83	05
32	Seattle	CM&StP-GT-NYC	10	5	3	10.00P—2/13	6.12P—2/17	92	12
33	San Francisco	SP-UP-CGW-B&O	2	3	..	9.20P—2/15	2.50A—2/20	101	30
34	Vancouver	CN-DL&W	5	6	2	5.36P—2/22	10.15A—2/26	88	39
35	San Francisco	SP-UP-CM&StP-PRR	..	2	..	4.27P—2/23	.....	....	..
36	San Francisco	SP-UP-CM&StP-NYC	2	..	..	4.27P—2/24	8.45P—2/28	100	18
37	San Francisco	WP-UP-CM&StP-PRR	2	4	4	5.30P—2/22	8.35A—2/27	111	05
38	Seattle	GN-CB&Q-GT-DL&W	1	2	..	12.37A—2/24	2.20P—2/27	86	03
39	Seattle	CM&StP-MC-NYC	2	2	1	6.03P—2/27	9.12A—3/2	87	09
40	Seattle	GN-CB&Q-NYC&StL-Erie	2	7	1	9.00P—2/28	8.30A—3/3	83	30
			46	58	17			1460	40
		16 Trains—Average Time						91	17

STATEMENT OF CARLOAD SHIPMENTS OF TRANSCONTINENTAL SILK.

MARCH, 1928.

Line	Port	Route	Cars Hob.	Cars NY.	Cars Others	Depart.	Dely. to HS.	Hours in Transit Hrs.	Hours in Transit Min.
41	Seattle	CM&StP-B&O	3	1	3	9.00P—3/1	10.16A—3/5	85	16
42	Seattle	UP-C&NW-Erie	2	6	1	6.30P—3/1	7.30A—3/5	85	..
43	Seattle	UP-CM&StP-Wab-DLW	1	4	1	11.22P—3/2	12.51P—3/6	84	59
44	San Francisco	SP-UP-CM&StP-Erie	2	4	1	1.49P—3/5	7.00A—3/9	89	11
45	Vancouver	CP-NYC	5	6	..	5.37P—3/4	1.16A—3/9	107	39
46	San Francisco	SP-UP-C&NW-PRR	1	1	..	4.27P—3/8	2.30P—3/14	142	03
47	San Francisco	SP-UP-C&NW-NYC	..	1	..	11.30A—3/10	.....	...	..
48	Seattle	GN-CB&Q-MC-NYC	2	3	3	3.51P—3/11	5.20A—3/15	85	29
49	Seattle	NP-C&NW-GT-DL&W	4	5	3	9.12P—3/12	1.30P—3/16	88	18
50	Vancouver	CN-NYC	5	4	3	10.16A—3/14	9.34A—3/18	95	18
51	San Francisco	AT&SF-PRR	1	3	..	1.17P—3/16	9.00A—3/21	115	43
52	Vancouver	CP-NYC	3	4	3	11.45A—3/20	2.45P—3/24	99	..
53	San Francisco	WP-UP-CM&StP-Erie	2	2	2	5.00P—3/22	7.50A—3/26	86	50
54	Seattle	GN-CB&Q-B&O	6	4	2	10.05P—3/22	9.44A—3/26	84	39
55	San Francisco	AT&SF-GT-DL&W	3	4	1	2.45P—3/25	10.30A—3/29	91	45
56	Seattle	UP-CB&Q-PRR	3	3	1	7.15P—3/26	10.45A—3/30	87	30
57	Vancouver	CP-NYC	4	5	5	6.05P—3/25	8.55P—3/29	98	50
58	Seattle	CM&StP-PRR	1	1	1	9.40A—3/27	1.15A—4/1	111	35
59	Seattle	UP-CGW-NYC	3	2	1	3.55P—3/27	7.04A—3/31	85	09
60	San Francisco	SP-UP-IC	1	3	1	10.17P—3/30	6.58P—4/3	92	41
61	San Francisco	WP-UP-CB&Q-B&O	1	2	1	2.10P—3/31	4.40A—4/4	86	30
			53	68	33			1903	25
		20 Trains—Average Time						95	10

STATEMENT OF CARLOAD SHIPMENTS OF TRANSCONTINENTAL SILK.

APRIL, 1928.

Line	Port	Route	Cars Hob.	Cars NY.	Cars Others	Depart.	Dely. to HS.	Hours in Transit Hrs.	Hours in Transit Min.
62	Vancouver	CN-Erie	4	2	2	8.20A—4/5	10.45A—4/9	98	25
63	Seattle	NP-C&NW-Erie	1	4	..	4.26P—4/6	2.10A—4/10	81	44
64	San Francisco	SP-UP-C&NW-NYC	1	1	..	11.22A—4/9	6.58A—4/14	115	36
65	Seattle	GN-CB&Q-Wab-DL&W	6	3	2	12.55P—4/7	8.20A—4/11	91	25
66	Seattle	GN-CB&Q-Erie	4	4	2	11.25P—4/9	10.20A—4/13	82	55
67	Vancouver	CP-NYC	4	4	..	4.30P—4/10	6.09A—4/14	85	39
68	San Francisco	WP-UP-CB&Q-MC-NYC	2	2	2	2.40P—4/14	5.00A—4/18	86	20
69	Seattle	NP-CB&Q-NYC&StL-DL&W	1	..	..	7.15P—4/10	7.45A—4/16	132	30
70	Vancouver	CP-NYC	3	3	4	4.53P—4/15	7.07P—4/19	98	14
71	Seattle	UP-C&NW-Wab-DL&W	2	1	1	6.00P—4/20	11.40A—4/24	89	40
72	San Francisco	SP-UP-IC-GT-DL&W	6	1	1	4.19P—4/19	8.45A—4/23	88	26
73	Seattle	CM&StP-PRR	3	4	3	11.25A—4/18	8.45A—4/23	117	20
74	Seattle	GN-CB&Q-NYC	4	2	1	1.36P—4/22	11.59P—4/25	81	25
75	Seattle	CM&StP-NYC	3	6	1	6.12P—4/23	6.08A—4/27	83	56
76	Vancouver	CN-DL&W	2	3	2	10.35P—4/23	7.35A—4/28	105	..
77	San Francisco	SP-UP-C&NW-NYC	3	4	2	6.26P—4/27	8.18A—5/1	85	52
78	Seattle	CM&StP-MC-NYC	2	6	1	6.30A—4/28	7.45P—5/1	85	15
			51	50	24			1607	42
		17 Trains—Average Time						94	34

STATEMENT OF CARLOAD SHIPMENTS OF TRANSCONTINENTAL SILK.

MAY, 1928.

Line	Port	Route	Cars Hob.	Cars NY.	Cars Others	Depart.	Dely. to HS.	Hours in Transit Hrs.	Hours in Transit Min.
79	Seattle	GN-CB&Q-Wab-DL&W	5	5	3	2.05P—5/2	6.30A—5/7	112	25
80	San Francisco	SP-UP-CM&St.P-NYC	..	2	..	6.10A—5/7	.....	...	...
81	Seattle	SP-UP-CM&StP-GT-DL&W	1	3	1	11.52A—5/3	6.30A—5/7	90	38
82	Seattle	UP-C&NW-B&O	5	5	2	6.25P—5/2	10.57A—5/11	208	32
83	Vancouver	CP-NYC	4	6	6	6.37P—5/2	9.10P—5/10	194	33
84	Seattle	CM&StP-Wab-DL&W	4	7	2	11.15P—5/7	2.13P—5/11	86	58
85	Seattle	UP-C&NW-Wab-DL&W	1	4	1	4.50P—5/8	6.56A—5/12	86	06
86	San Francisco	WP-UP-CB&Q-PRR	7	6	5	10.10P—5/12	6.35A—5/17	104	25
87	Seattle	GN-CB&Q-PRR	3	3	2	12.35P—5/16	8.30A—5/21	115	55
88	Vancouver	CN-NYC	3	4	3	4.41A—5/17	2.51A—5/21	94	10
89	San Francisco	AT&SF-PRR	2	2	1	12.31P—5/17	8.30A—5/21	91	59
90	San Francisco	SP-UP-C&NW-NYC	1	7	..	5.30P—5/19	6.55A—5/23	85	25
91	Seattle	NP-CGW-Wab-DL&W	7	5	3	7.26P—5/21	12.10P—5/25	88	44
92	Vancouver	CP-NYC	5	2	3	12.10A—5/22	12.31A—5/26	95	21
93	San Francisco	AT&SF-NYC	2	2	..	1.05P—5/24	8.12A—5/28	91	07
94	San Francisco	SP-UP-CRI&P-MC-NYC	1	3	1	12.52P—5/25	5.20A—5/30	112	28
95	Vancouver	CP-NYC	4	4	4	4.20P—5/27	5.22A—6/1	109	02
96	Seattle	GN-CB&Q-NYC&StL-Erie	7	3	3	4.50P—5/30	5.40A—6/4	108	50
			62	73	40			1876	38
		17 Trains—Average Time						110	23

COMPLAINANT'S EXHIBIT No. 25, Witness Hawkins.

Docket No. 18672.
Exhibit No. 25.
Witness Hawkins.

Import

IMPORT RATES FROM PACIFIC PORTS TO HOBOKEN, N. J.

AUTHORITY—AGENT H. G. TOLL'S ICC 1185

Rates in Cents per 100 lbs.

Item	Articles	LCL	C L	Min. Wght.	Revenue per car
210	Bagging, Burlap, Gunny or Jute	...	90	40000	$360.00
215	Bamboo and Rattan	240	180	30000	480.00
220	Baskets	300	240	24000	576.00
245	Bulbs and Plants	240	175	20000	350.00
270	Camphor	240	180	30000	540.00
272	Canned Crabs	...	125	30000	375.00
273	Canned Fish	...	105	60000	630.00
285	Chinaware and Crockery	240	180	24000	432.00
350	Butter and Eggs	...	230	24000	552.00
365	Feathers	...	165	24000	396.00
370	Fiber, Hemp, Jute, etc.	...	90	40000	360.00
380	Fireworks	290	240	20000	480.00
400	Furniture, Bamboo, etc.	360	...	.....	.....
415	Glassware	240	180	24000	432.00
450	Hides, Green Salted	...	125	36000	450.00
475	Lamps, Incandescent	480	300	16000	480.00
485	Lumber	...	96	40000	384.00
500	Mats and Matting	240	180	24000	432.00
570	Rattan	...	144	36000	518.40
575	Rubber, Crude	270	120	30000	360.00
570	Rugs, Hemp, etc.	240	180	30000	540.00

Item	Articles	LCL	CL	Min. Wght.	Revenue per car
630	Skins and Hides, Dry ..	283½	180	20000	360.00
645	Spices	240	150	30000	450.00
675	Tea	300	180	24000	432.00
700	Tin, Bar or Block	...	90	50000	450.00
710	Toys	360	240	24000	576.00
720	Wax, Paraffine	...	113½	30000	340.50
730	Wool	150	...	.....	.....
740	Wool in Grease	...	125	30000	375.00
745	Wool, Scoured	...	150	20000	300.00
	Average		162.6	28930	443.20

COMPLAINANT'S EXHIBIT No. 26, Witness Hawkins.

Docket No. 18672.
Exhibit No. 26.
Witness Hawkins.

RATES FROM SEATTLE AND VANCOUVER TO HOBOKEN, N. J.

AUTHORITY—AGENT H. G. TOLL'S ICC 1186

Rates in Cents per 100 lbs.

Classes	1	2	3	4	5	A	B	C	D	E
Rates	555	480	398	338	285	288	228	180	173	158

COMMODITY RATES

Item	Articles	LCL	CL	Min. Wght.	Revenue per car
1340	Brooders and Incubators		203	24000	$487.20
1390	Canned Goods		128	40000	512.00
			105	60000	630.00
1425	Canned Salmon, etc.....		95	70000	665.00
1535	Cooked Cereal Food Preparations		140	24000	336.00
1605	Clothing	375	263	30000	789.00
1620	Coffee, Green		120	40000	480.00
1655	Coiled Wooden Hoops, etc.		126	40000	504.00
1700	Butter and Eggs		300	24000	720.00
1740	Dry Goods		240	24000	576.00
1855	Fiber, Hemp, Manila, etc.		113	36000	406.80
1875	Fish, Salted, Smoked, etc.		150	30000	450.00
2105	Glue Stock, Prepared ...		113	40000	452.00
2150	Hair, Cattle, Goat, etc. ..	330	128	30000	384.00
2220	Hides, Dry		270	20000	540.00
2560	Machinery and Machines		231	30000	693.00
2630	Matches		165	24000	396.00

COMMODITY RATES

Item	Articles	LCL	CL	Min. Wght.	Revenue per car
2795	Lard and Substitutes ..		187½	30000	562.50
3230	Shells, Cocoanut		114	40000	456.00
3355	Syrup		113	36000	406.80
3515	Automobiles		495	10000	495.00
3795	Apples, Fresh		150	30000	450.00
	Average		179½	33270	$517.27

COMPLAINANT'S EXHIBIT No. 27, Witness Hawkins.

Docket No. 18672.
Exhibit No. 27.
Witness Hawkins.

RATES FROM SAN FRANCISCO TO HOBOKEN, N. J.

AUTHORITY—AGENT H. G. TOLL'S ICC 1199

Rates in Cents per 100 lbs.

Classes	1	2	3	4	5	A	B	C	D	E
Rates	555	480	398	338	285	288	228	180	173	159

COMMODITY RATES

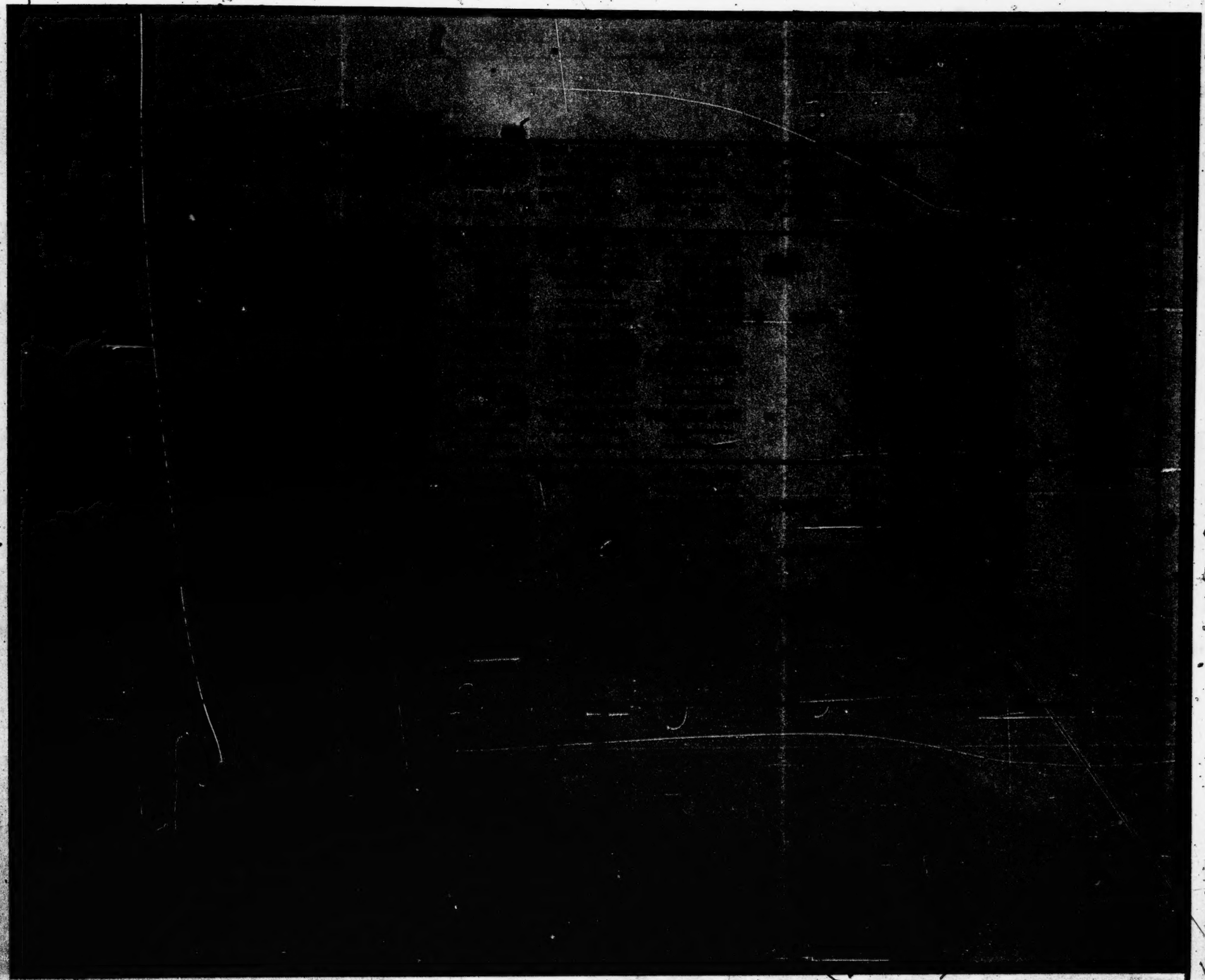
Item	Articles	LCL	CL	Min. Wght.	Revenue per car
1390	Canned Goods	...	128	40000	$512.00
			105	60000	630.00
1400	Citrus Fruit Juices	225	...	.....	.....
1425	Canned Fish	...	90	70000	630.00
	Canned Salmon	...	95	70000	665.00
1535	Cooked Cereal Food Preparat's	...	140	24000	336.00
1670	Cordage	360	165	40000	660.00
1700	Butter, Eggs, etc.	...	300	24000	720.00
1730	Drugs, Medicines & Chemicals	375	252	30000	756.00
1735	Dry Goods	240	187½	30000	562.50
1845	Manure, Animal	...	90	60000	540.00
1865	Fish, Fresh or Frozen	...	188	30000	664.00
1935	Lemons and Deciduous Fruit	...	150	32000	480.00
1955	Grapes	...	160	30000	480.00
		...	187½	26000	487.50
1960	Fruit, Dried or Evaporated	330	165	40000	660.00
		...	125	60000	750.00

COMMODITY RATES

Item	Articles	LCL	C L	Min. Wght.	Revenue per car
2435	Leather	...	180	30000	540.00
2450	Caustic Soda	...	97½	40000	390.00
2500	Wine	338	113	30000	339.00
2670	Pianos and Organs	...	398	12000	477.60
2680	Nursery & Florist Stock	...	187½	20000	375.00
2690	Nuts, Edible	...	175	30000	525.00
2805	Fresh Meat	...	313	21000	970.30
3100	Rice	...	90	60000	540.00
3420	Tin Cans	...	203	22000	446.60
3500	Vegetables, Fresh	...	151	30000	453.00
3505	Cabbage	...	151	24000	362.40
3510	Vegetables, Fresh	...	175	20000	350.00
	Average		170	35900	$546.40

COMPLAINANT'S EXHIBIT

Railroad	Ry. Op. Rev. A - 3	Ry. Op. Exp. A - 3	Net Rev. from Ry. Operations A - 3	Ry. Tax Accruals A - 4	[illegible] 1916 Net Revenue A - 5	A - 6	A - 7	A - 8
[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]



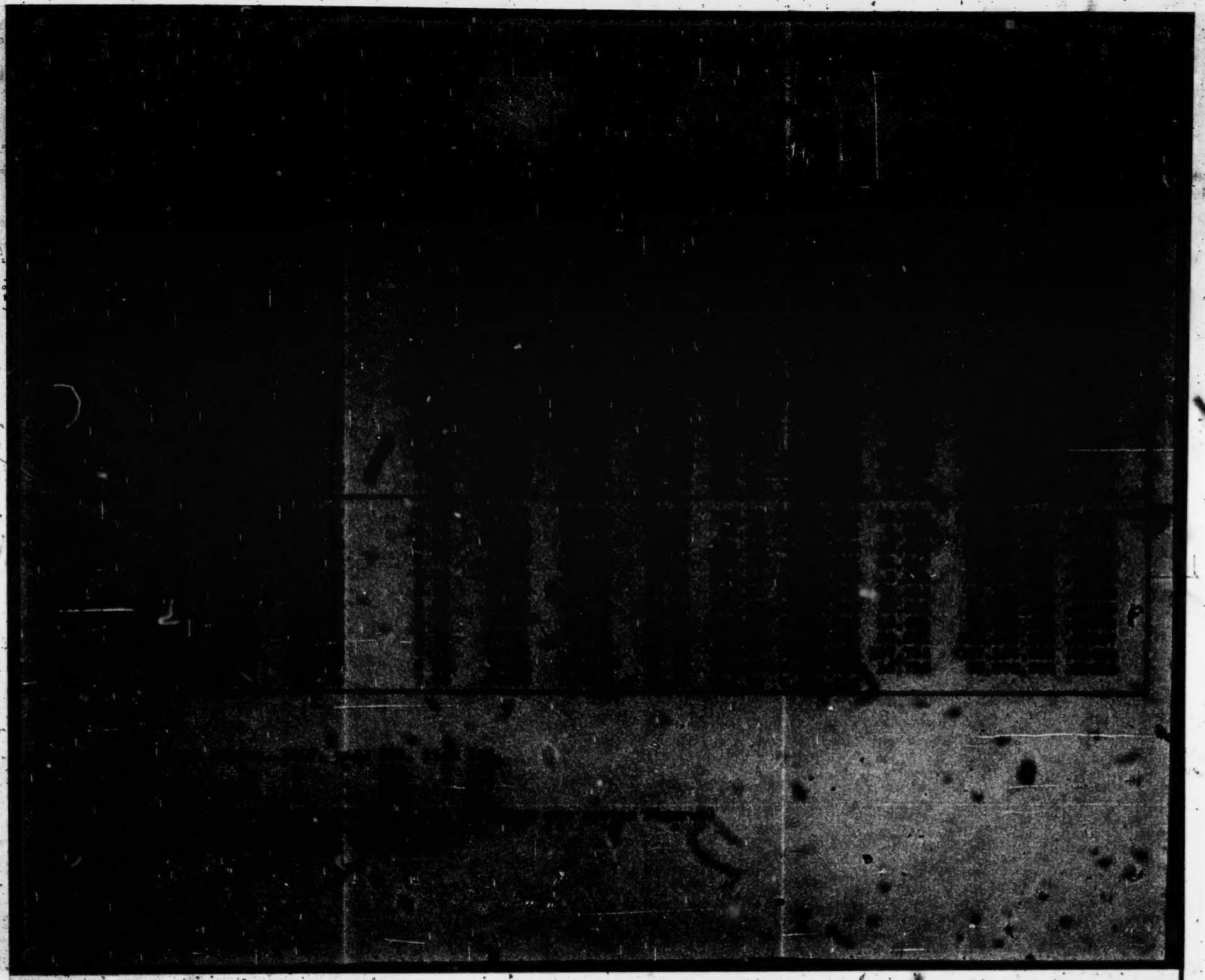
COMPLAINANT

STATISTICAL EXHIBIT FURNISHING [illegible]

Column -	Frt. service op. exp. related to frt. service A - 35	A - 37	Op. exp. apportioned to freight service A - 38	Op. exp. allocated to frt. service A - 39	A - 40	A - 41	A - 42	A - 43	A - 44
[illegible]	$150,962,414	$47,847,755	$80,879,160	$98,186,816	28.77	28.48	28.48	28.48	28.48
	118,477,414	40,178,087	40,406,496	50,000,000	30.40	28.34	28.34	28.34	28.34
	19,182,758	8,986,387	4,841,704	14,000,000	31.48	17.48	17.48	17.48	17.48
	108,320,488	34,127,307	36,488,787	80,000,000	35.14	15.15	15.15	15.15	15.15
	127,000,000	38,000,000	48,218,504	98,000,000	30.49	17.00	17.00	17.00	17.00
	54,000,000	40,748,979	20,000,000	70,000,000	28.14	17.00	17.00	17.00	17.00
	20,071,488	8,000,000	6,000,000	14,000,000	28.57	18.00	18.00	18.00	18.00
	94,000,000	28,000,000	21,000,000	57,000,000	37.86	17.00	17.00	17.00	17.00
	121,000,000	48,000,000	30,000,000	80,000,000	37.47	17.00	17.00	17.00	17.00
	75,000,000	28,000,000	15,000,000	48,000,000	36.04	17.00	17.00	17.00	17.00
	28,000,000	7,000,000	9,000,000	17,000,000	31.00	17.00	17.00	17.00	17.00
	24,000,000	7,000,000	8,000,000	15,000,000	30.00	17.00	17.00	17.00	17.00
	154,000,000	56,000,000	55,000,000	100,000,000	31.00	17.00	17.00	17.00	17.00
	68,000,000	25,000,000	24,000,000	45,000,000	35.00	17.00	17.00	17.00	17.00
	13,000,000	6,000,000	3,000,000	10,000,000	30.00	17.00	17.00	17.00	17.00
	965,000,000	34,000,000	49,000,000	140,000,000	30.00	17.00	17.00	17.00	17.00
	46,000,000	15,000,000	9,000,000	25,000,000	30.00	17.00	17.00	17.00	17.00
	41,000,000	15,000,000	9,000,000	25,000,000	30.00	17.00	17.00	17.00	17.00
	57,000,000	21,000,000	30,000,000	70,000,000	30.00	17.00	17.00	17.00	17.00
	17,000,000	6,000,000	4,000,000	10,000,000	30.00	17.00	17.00	17.00	17.00
	80,000,000	21,000,000	12,000,000	40,000,000	30.00	17.00	17.00	17.00	17.00
	68,000,000	21,000,000	12,000,000	40,000,000	30.00	17.00	17.00	17.00	17.00
	80,000,000	21,000,000	14,000,000	40,000,000	30.00	17.00	17.00	17.00	17.00
	460,000,000	200,000,000	81,000,000	300,000,000	30.00	17.00	17.00	17.00	17.00
	460,000,000	200,000,000	87,000,000	300,000,000	30.00	17.00	17.00	17.00	17.00
	68,000,000	21,000,000	12,000,000	40,000,000	30.00	17.00	17.00	17.00	17.00
	13,000,000	4,000,000	2,000,000	6,000,000	30.00	17.00	17.00	17.00	17.00

Items of form with in-short reference:

A-35 = Annual Report, 1977, line 101, page 335
A-37 = " " " " page 335 line 247, column (f)
A-38 = " " " " 335 " 247, " (d)
A-39 = Total of columns A-37 and A-38
A-40 = Annual Report, 1977, page 335, line 247
A-41 = " " " " 335 " 101
A-42 = Total of columns A-40 and A-41
A-43 = Annual Report, 1977, page 335, line 101
A-44 = " " " " 335



STATISTICAL EXHIBIT PERTAINING

Columns →	Service (Train Rev.)	Service Related to Passenger Service	[illegible]	[illegible]	[illegible]	[illegible]
	A - 17	A - 18	A - 19			
[illegible]	351,813,249	322,178,784	320,154,331			
[illegible]	31,276,498	18,798,079	18,398,890			
CNW	6,588,185	3,805,461	1,460,316			
Can.Nat.						
Can.Pac.						
CRIW	35,343,782	25,035,197	11,344,034			
[illegible]	29,087,551	19,714,446	14,938,814			
[illegible]	23,748,588	18,580,011	29,586,945			
[illegible]	6,814,451	3,457,789	2,183,145			
[illegible]	18,619,881	15,674,985	7,186,251			
[illegible]	30,049,440	19,127,187	9,045,434			
[illegible]	16,386,048	13,088,088	6,698,549			
GRL	5,873,590	3,179,013	3,374,682			
[illegible]	5,104,804	2,886,170	3,240,177			
[illegible]	51,881,008	28,060,318	22,185,228			
[illegible]	28,084,889	10,876,894	9,590,634			
[illegible]	8,098,954	1,647,076	1,047,306			
[illegible]						
MO	36,140,841	27,879,791	18,564,939			
[illegible]	10,569,748	9,687,096	8,501,950			
NLW	18,892,898	11,497,977	3,767,144			
Erie	17,881,806	737,799	883,149			
[illegible]	3,001,889	2,183,889	681,178			
[illegible]	11,881,488	7,881,844	3,803,956			
Mich.Cent.	25,840,088	11,784,814	5,473,654			
[illegible]	2,468,867	2,454,987	1,896,987			
[illegible]	128,444,898	88,348,844	26,900,445			
[illegible]	176,805,807	108,708,988	39,088,565			
Wab.	10,788,788	7,014,814	3,918,089			
Chicago & Erie	1,788,880	1,080,464	588,828			

Source of Data shown in above columns:

A-17 - Annual Report, 1937, page 308, [illegible] 105
A-18 - " " " " 308, line 207, column (h)
A-19 - " " " " 309, " 207, " (f)
A-20 - Total of columns A-18 and A-19
A-21 - Annual Report, 1937, page 308, [illegible] 105
A-22 - " " " " 309, " 105
A-23 - " " " " 308, " 105
A-24 - " " " " 308, " 105
A-25 - " " " " 308, " 105

STATISTICAL EXHIBIT FOR [illegible]

Passenger Service Train Rev. A - 17	Op. Expenses related to passenger service A - 18	Op. Expenses apportioned to pass. serv. A - 19						
$31,519,349	$24,178,734	$20,454,281	$44,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
51,676,495	35,936,079	15,398,890	51,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
4,882,186	3,403,351	1,480,316	4,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
35,843,782	25,053,197	11,344,034	36,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
29,087,281	19,714,448	14,933,214	34,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
29,768,580	18,380,011	29,388,948	47,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
6,214,431	3,437,709	2,163,149	5,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
15,429,881	15,574,985	7,188,281	22,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
30,069,440	19,157,167	9,045,434	28,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
16,388,048	13,088,088	6,698,540	19,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5,873,590	3,179,019	3,374,682	6,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5,106,[illegible]	2,886,170	3,240,177	6,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
51,881,008	26,060,318	22,185,838	50,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
22,026,850	10,576,896	9,590,636	20,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2,098,954	1,547,076	1,047,306	2,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
35,140,541	27,279,791	12,564,939	39,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
10,589,748	9,627,098	2,501,950	12,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
15,898,888	11,497,977	3,787,144	15,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
17,881,308	737,799	883,149	1,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
3,001,989	2,125,549	881,178	3,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
11,881,435	7,881,346	3,303,926	10,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
25,940,082	11,744,814	5,473,656	17,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2,648,267	2,454,287	1,296,287	3,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
128,444,488	65,565,244	26,900,445	92,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
176,395,897	109,705,952	39,088,865	148,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
10,788,788	7,014,214	3,915,089	10,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1,788,280	1,080,464	536,828	1,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Source of Data shown in above columns:

A-17 - Annual Report, 1937, page 306, lines 1[illegible]
A-18 - " " " " 307, line [illegible], column (f)
A-19 - " " " " 309, " [illegible], " (f)
A-20 - Total of columns A-18 and A-19
A-21 - Annual Report, 1937, page 306, line [illegible]
A-22 - " " " " 306, " [illegible]
A-23 - " " " " 306, " [illegible]
A-24 - " " " " 306, " [illegible]

Defendants' Exhibit No. 31, Witness Hodkinson

DEFENDANTS' EXHIBIT No. 31, Witness Hodkinson.

BEFORE THE INTERSTATE COMMERCE COMMISSION
I. C. C. Docket 18672
HOBOKEN MANUFACTURERS' RAILROAD
vs.
RAILROADS.

RATE OF RETURN ON PROPERTY INVESTMENT.

CALENDAR YEAR ENDED DECEMBER 31, 1925.

Road	Property Investment A Dec. 31, 1925	Total Operating Revenues	Total Operating Expenses	Railway Tax Accruals	Uncollectible Railway Revenues
Central R. R. of New Jersey	200 117 249	55 092 100	41 388 145	4 540 580	29 173
Delaware, Lackawanna & Western	291 094 075	88 635 056	62 390 609	6 832 653	9 772
Lehigh Valley	258 468 372	74 430 573	57 433 390	3 604 182	17 400
New York, Ontario & Western	99 391 689	12 247 511	10 319 418	431 181	1 211
Sub Total	849 071 385	225 405 240	171 531 562	15 408 596	57 566
Baltimore & Ohio	824 331 654	237 546 940	179 099 597	10 064 868	53 452
Erie	492 160 931	104 252 181	84 757 361	4 042 068	43 829
New York Central	1 348 797 835	385 994 505	290 440 958	25 843 923	217 276
Pennsylvania	2 227 586 744	672 136 962	527 139 347	31 700 789	279 863
Sub Total	4 892 877 164	1 399 930 588	1 081 437 263	71 151 648	594 420
Total	5 741 948 549	1 625 335 828	1 252 968 825	86 560 244	651 976

CALENDAR YEAR ENDED DECEMBER 31, 1926.

	Property Investment as of Dec. 31, 1926				
Central R. R. of New Jersey	201 807 789	60 171 118	45 993 621	4 780 862	77 810
Delaware, Lackawanna & Western	299 763 624	88 823 202	62 434 221	7 672 085	9 500
Lehigh Valley	268 055 467	80 453 150	60 958 636	4 193 976	11 800
New York, Ontario & Western	100 482 426	13 974 119	10 974 004	570 416	2 661
Sub Total	870 109 306	243 421 589	180 360 482	17 217 339	101 771
Baltimore & Ohio	866 385 853	252 361 830	186 306 274	11 843 416	233 747
Erie	499 706 666	110 574 019	90 386 252	4 350 583	44 652
New York Central	1 385 222 155	399 497 436	298 926 535	26 874 579	165 809
Pennsylvania	2 301 570 044	709 817 450	550 300 578	37 110 193	261 611
Sub Total	5 052 884 718	1 472 250 735	1 125 979 639	80 178 771	705 819
Total	5 922 994 024	1 715 672 324	1 306 340 121	97 396 110	807 590

DEFENDANTS' EXHIBIT No. 31, Witness Hodkinson.

BEFORE THE INTERSTATE COMMERCE COMMISSION
I. C. C. Docket 18672
HOBOKEN MANUFACTURERS' RAILROAD
vs.
RAILROADS.

Witness E. A. Hodkinson.
Exhibit No. 31.

RATE OF RETURN ON PROPERTY INVESTMENT.

CALENDAR YEAR ENDED DECEMBER 31, 1925.

	Property Investment A Dec. 31, 1925	Total Operating Revenues	Total Operating Expenses	Railway Tax Accruals	Uncollectible Railway Revenues	Hire of Equipment & Jt. Facility Net Rentals	Net Railway Operating Income Amount	Net Railway Operating Income Rate of Return
.....	200 117 249	55 092 100	41 388 145	4 540 580	29 173	Dr 1 380 740	7 753 462	3.87
.....	291 094 075	83 635 056	62 390 609	6 832 653	9 772	Cr 531 976	14 933 998	5.13
.....	258 468 372	74 430 573	57 433 390	3 604 182	17 400	Dr 880 621	12 494 980	4.83
.....	99 391 689	12 247 511	10 319 418	431 181	1 211	Dr 404 240	1 091 461	1.10
.....	849 071 385	225 405 240	171 531 562	15 408 596	57 566	Dr 2 133 625	36 273 901	4.27
.....	824 331 654	237 546 940	179 099 597	10 064 868	53 452	Dr 5 294 936	43 034 087	5.22
.....	492 160 931	104 252 181	84 757 361	4 042 068	43 829	Cr 393 146	15 802 069	3.21
.....	1 348 797 835	385 994 505	290 440 958	25 343 923	217 276	Dr 2 071 798	67 920 550	5.04
.....	2 227 586 744	672 136 962	527 139 347	31 700 789	279 863	Dr 12 908 955	100 108 008	4.49
.....	4 892 877 164	1 399 930 588	1 081 437 263	71 151 648	594 420	Dr 19 882 543	226 864 714	4.64
.....	5 741 948 549	1 625 335 828	1 252 968 825	86 560 244	651 976	Dr 22 016 168	263 138 615	4.58

CALENDAR YEAR ENDED DECEMBER 31, 1926.

	Property Investment as of Dec. 31, 1926							
.....	201 807 789	60 171 118	45 993 621	4 780 862	77 810	Dr 1 267 290	8 051 535	3.99
.....	299 763 624	88 823 202	62 434 221	7 672 085	9 500	Cr 580 566	19 287 962	6.43
.....	268 055 467	80 453 150	60 958 636	4 193 976	11 800	Dr 1 486 133	13 802 605	5.15
.....	100 482 426	13 974 119	10 974 004	570 416	2 661	Dr 618 908	1 808 130	1.80
.....	870 109 306	243 421 589	180 360 482	17 217 339	101 771	Dr 2 791 765	42 950 232	4.94
.....	866 395 853	252 361 530	186 306 274	11 643 416	233 747	Dr 3 173 056	50 805 337	5.86
.....	499 705 666	119 974 013	86 [illegible]	[illegible]	44 652	Cr 735 212	16 527 744	3.31
.....	1 [illegible]	[illegible]	[illegible]	[illegible]	165 909	Dr 1 399 460	72 131 053	5.21
.....	2 501 [illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Sub Total	5 052 884 718	1 472 250 735	1 125 979 639	89 178 771		706 513	Dr
Total	5 922 994 024	1 715 672 324	1 306 340 121	97 396 110		807 550	Dr

CALENDAR YEAR ENDED DECEMBER 31, 1927.

	Property Investment as of Dec. 31, 1927	Total Operating Revenues	Total Operating Expenses	Railway Tax Accruals	Uncollectible Railway Revenues	Equipment Rents —Net Balance		Joint —I
Central R. R. of New Jersey	208 656 576	58 745 712	43 344 247	3 738 002	13 971	Dr 918 445	Dr	
Delaware, Lackawanna & Western	313 870 379	84 699 577	60 237 308	7 457 596	12 241	Cr 226 511	Cr	
Lehigh Valley	272 937 948	74 502 819	59 270 392	3 473 511	9 647	Dr 1 901 697	Dr	
New York, Ontario & Western	99 738 143	13 157 620	10 972 046	455 856	2 773	Dr 567 905	Dr	
Sub Total	895 203 046	231 105 728	173 823 993	15 124 965	38 632	Dr 3 161 536	Dr	
Baltimore & Ohio, Inc. CI&W	933 821 410	246 078 510	186 168 521	12 286 617	47 987	Dr 1 738 556	Dr	
Erie	502 374 437	108 357 165	91 623 209	4 233 084	32 063	Dr 657 164	Cr	
New York Central	1 423 170 259	385 046 787	294 910 984	24 958 007	106 118	Dr 5 822 724	Cr	
Pennsylvania	2 347 315 342	664 851 023	510 668 662	35 709 749	149 611	Dr 12 923 190	Dr	
Sub Total	5 206 681 448	1 404 333 485	1 083 371 376	77 187 457	335 779	Dr 21 141 634	Cr	
Total	6 101 884 494	1 635 439 213	1 257 195 369	92 312 422	374 411	Dr 24 303 170	Cr	

AVERAGE FOR THREE YEARS.

4 Trunk Lines	2 614 383 737					Dr
4 Trunk Lines in C. F. A.	15 152 443 330					Dr
	17 766 827 067	4 976 447 365	3 816 504 315	276 268 776	1 833 977	Dr

A—Property investment represents book investment in road and equipment including investment of leased lines, etc.; the earning "Net Railway Operating Income." Property investment also includes materials and supplies and cash.

SOURCE: Carriers' Reports to Interstate Commerce Commission.

.....	2 901 [illegible]	[illegible]	550 360 575	37 110 195	201 611	Dr 15 652 310	100 432 758	4.02
.....	5 033 884 718	1 472 250 735	1 125 979 639	80 178 771	705 819	Dr 19 489 614	245 896 892	4.87
.....	5 922 994 024	1 715 672 324	1 306 340 121	97 396 110	807 590	Dr 22 281 379	288 847 124	4.88

CALENDAR YEAR ENDED DECEMBER 31, 1927.

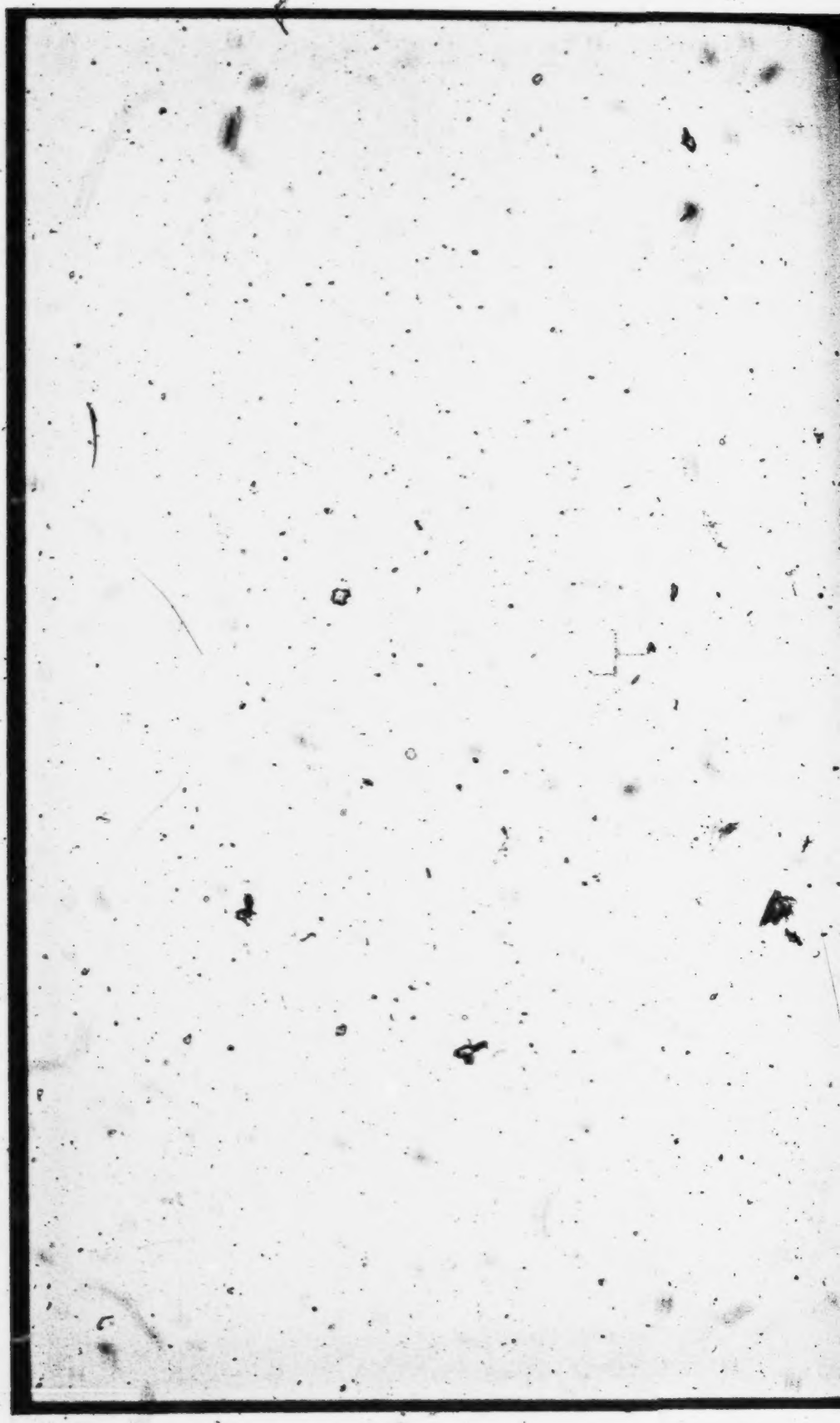
Property Investment as of Dec. 31, 1927	Total Operating Revenues	Total Operating Expenses	Railway Tax Accruals	Uncollectible Railway Revenues	Equipment Rents —Net Balance	Joint Facility Rents —Net Balance	Net Railway Operating Income — Amount	Net Railway Operating Income — Rate of Return
208 656 576	58 745 712	43 344 247	3 738 002	13 971	Dr 918 445	Dr 347 094	10 383 963	4.98
313 870 379	84 699 577	60 237 308	7 457 596	12 241	Cr 226 511	Cr 133 674	17 352 617	5.53
272 937 948	74 502 819	59 270 392	3 473 511	9 647	Dr 1 901 697	Dr 11 805	9 835 767	3.60
99 738 143	13 157 620	10 972 046	455 856	2 773	Dr 567 905	Dr 92 903	1 066 137	1.07
895 203 046	231 105 728	173 823 993	15 124 965	38 632	Dr 3 161 536	Dr 318 128	38 [illegible] 474	4.32
933 821 410	246 078 510	186 168 521	12 286 617	47 987	Dr 1 738 556	Dr 1 019 602	44 817 227	4.80
502 374 437	108 357 165	91 623 209	4 233 084	32 063	Dr 657 164	Cr 313 492	12 125 137	2.41
1 423 170 259	385 046 787	294 910 984	24 958 007	106 118	Dr 5 822 724	Cr 2 978 763	62 227 717	4.37
2 347 315 342	664 851 023	510 668 662	35 709 749	149 611	Dr 12 923 190	Dr 1 422 508	103 977 303	4.43
5 206 681 448	1 404 333 485	1 083 371 376	77 187 457	335 779	Dr 21 141 634	Cr 850 145	223 147 384	4.29
6 101 884 494	1 635 439 213	1 257 195 369	92 312 422	374 411	Dr 24 303 170	Cr 432 017	261 785 858	4.29

AVERAGE FOR THREE YEARS.

2 614 383 737						Dr 8 405 054	117 862 607	4.51
15 152 443 330						Dr 59 663 646	695 908 990	4.59
17 766 827 067	4 976 447 365	3 816 504 315	276 268 776	1 833 977		Dr 68 068 700	813 771 597	4.58

[illegible]resents book investment in road and equipment including investment of leased lines, etc.; the earnings from which are included in item of [illegible]ng Income." Property investment also includes materials and supplies and cash.

SOURCE: Carriers' Reports to Interstate Commerce Commission.



REPORT AND ORDER OF THE COMMISSION.

(Filed and entered May 7, 1929.)

BEFORE THE

INTERSTATE COMMERCE COMMISSION.

No. 18672.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

No. 18672.

HOBOKEN MANUFACTURERS' RAILROAD COMPANY *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY ET AL.

Submitted March 6, 1929. Decided May 7, 1929.

On rehearing, division of joint rates accorded the Hoboken Manufacturers' Railroad Company on silk from points on the Pacific coast to its line at Hoboken, N. J., found unjust, unreasonable, and inequitable. Just, reasonable, and equitable division prescribed. Findings in 132 I. C. C. 579 modified in part.

Parker McCollester, Lord, Day & Lord, and *L. D. Hawkins* for complainant.

Willis T. Pierson, Marion B. Pierce, J. M. Souby, J. N. Davis, P. F. Gault, R. S. Outlaw, H. C. Barron, and *Elmer Westlake* for defendants.

For other appearances see former report.

REPORT OF THE COMMISSION ON REHEARING.

CAMPBELL, *Commissioner:*

In the original report, 132 I. C. C. 579, decided November 5, 1927, division 1 found that on and since August 6,

1926, the division received by complainant out of the joint rates on silk from points on the Pacific coast to destinations upon its line was, is, and for the future would be unjust and unreasonable to the extent that it was, is, and for the future might be less than 22 cents per 100 pounds. Thereafter, defendants filed petitions for reargument and reconsideration. On February 28, 1928, the case of *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, hereinafter called the *Brimstone case*, was decided; and on May 14, 1928, upon our own motion we reopened the instant case for rehearing, which has been held. Exceptions to the report on rehearing proposed by the examiner were filed by complainant, and by defendants operating in central and trunk-line territories. Complainant replied to the exceptions of defendants, and the case was orally argued.

Complainant, Hoboken Manufacturers' Railroad, a corporation, is a common carrier by railroad subject to the interstate commerce act. By complaint filed August 6, 1926, it alleges that the division of joint rates accorded to it on shipments of silk from points on the Pacific coast to destinations on its line was and is unjust, unreasonable, and inequitable. An increased division is sought. Unless otherwise indicated, rates, costs, and divisions or allowances will be stated in amounts per 100 pounds.

Complainant's line is located in a highly developed industrial and warehouse district of Hoboken, N. J. Its operations extend over a distance of approximately 1.25 miles, exclusive of side and team tracks, from Second to Eighteenth Street, where it has direct track connections with the Erie Railroad. It also interchanges freight with other carriers in conection with the Erie and over its own float bridge at Hoboken. While complainant is engaged in a general railroad business, it is primarily a switching and terminal railroad. It owns locomotives and electric trucks, but no freight, baggage, or other cars. It was stipulated that complainant is efficiently managed and operated and that the transportation service rendered by it is of such

importance to the public as to make necessary its continued operation. These facts were likewise stipulated as to defendants.

A joint any-quantity rate of $9 is applicable on raw silk from the Pacific coast points to Hoboken, an average distance of 3288 miles. The carriers east of Chicago, Ill., receive 27.5 per cent. of this rate, or $2.475, for a haul of approximately 900 miles. This division is approximately 175 per cent. of the first-class rate from Chicago to New York, N. Y. Complainant's division is 5.25 cents. It seeks a division of 25 cents with a minimum of $25 per car.

The United States Testing Company, hereinafter called the testing company, and the Hoboken Chamber of Commerce intervened in support of complainant.

During the period extending from January, 1924, through April, 1928, the value of raw silk ranged from $4.20 to $8.25 per pound. At the time of the first hearing herein in November, 1926, the average value was $6 per pound, and at the rehearing it was stipulated as being worth $5.24 per pound as of November, 1927.

The shipments are imported from the Orient through the ports of San Francisco, Calif., Seattle, Wash., and Vancouver, B. C., herein referred to as the Pacific coast points, from which they move all rail in baggage or express cars to Hoboken. This all-rail movement is at passenger-train speed in special trainloads, averaging approximately seven cars per train. Armed guards protect the shipments en route. In addition, the line-haul carriers carry insurance to indemnify themselves against loss. These precautions are deemed necessary because of the high value of this commodity and its consequent susceptibility to loss or pilferage.

In the first five months of 1928 complainant handled 278 cars of raw silk, and 167 cars in October, November, and December, 1927. These shipments average 40,000 pounds per car. Although moved in carloads, each car contains numerous consignments, the shipments last above referred to containing an average of 7.5 consignments per car. Each

consignment averaged 38.8 bales, each bale weighing approximately 133 pounds. Complainant's service on this traffic, therefore, is that of a delivering carrier of less-than-carload freight. Under the circumstances it is its duty to provide a warehouse adequate for unloading, storing, and delivering these shipments. Its own freight station is inadequate for the handling and unsafe for the storing of this traffic. Its financial condition would not permit it to build or purchase one. Accordingly, it entered into an arrangement with the testing company whereby the latter unloads and stores this traffic and delivers it to the consignees. Under this arrangement the silk is stored in the testing company's warehouse for the free-time period, after the expiration of which it is warehoused there at the expense of the consignee. About 80 per cent. of these shipments are held the full free-time period before delivery to the consignee, which is only made by the testing company on order of complainant. No service is performed by the testing company for a consignee of raw silk until after delivery by complainant to the consignee.

Most of these shipments are received by complainant at its Erie connection, but a few are received at its float bridge. The shipments are usually received at the Erie connection in lots of from one to six cars. Upon arrival there notice is sent complainant, which then clears its track and switches the silk to the private sidetrack at the testing company's warehouse for unloading. This sidetrack holds three cars, and the movement thereto is a distance of about two city blocks, or 350 feet. After unloading the cars are returned promptly to the Erie. Armed guards are employed by complainant to protect the silk from the time it is received until it is unloaded into the warehouse. In addition a watchman patrols the warehouse at night.

Complainant contends that its present division for handling this traffic is not commensurate with the cost and value of the service performed; and that it needs additional revenues to pay its respective operating expenses, taxes,

and a fair return on its railway property held for and used in the service of transportation. It claims a total value on property held for and used in the service of transportation of $2,152,611.17, of which $587,573.17 is the book value of road and equipment, and $1,565,038 is the value of land. A return of 5.75 per cent. on this amount would be $123,775.14. The following table, taken from an exhibit of record, is a statement of railway revenues and expenditures of the Hoboken for the periods indicated:

	Six months ending Dec. 31, 1927	Jan. 1, 1928, to May 31, 1928	Total, July 1, 1927, to May 31, 1928
Railway operating revenue	$180,919.92	$197,271.15	$378,191.07
Railway operating expenses	138,255.77	153,643.51	291,899.28
Net revenue from railway operations	42,664.15	43,627.64	86,291.79
Railway tax accruals	24,302.74	20,008.10	44,310.04
Railway operating revenue	18,361.41	23,619.54	41,980.95
Nonoperating income	1,960.37	1,033.04	2,993.41
Gross income	20,321.78	24,652.58	44,974.36
Deductions from gross income	26,360.35	18,635.03	44,995.38
Net income	[1] 6,038.57	6,017.55	[1] 21.02

[1] Deficit.

The annual report made to us by complainant for the year 1927 shows that its net operating income for that year was 1.8 per cent. of its total investment in railroad property, the latter figure being shown as $1,095,593. A return of 5.75 per cent. on this amount would be $62,996.60. For that year complainant reported a net railway operating income of $20,136, which after deductions left a deficit of $5772.

The net railway operating income of complainant was much lower than that of any defendants, except two of the western roads. The average return for 1925, 1926, and 1927 of the four defendants operating in trunk-line territory was 4.51 per cent., and that of the four defendant trunk-line carriers operating in central territory was 4.59 per cent. The following table, from an exhibit of record, shows what the financial condition and earnings would have been had the division in issue been 22 cents on and after November 1, 1927:

	Six months ending Dec. 31, 1927	Jan. 1, 1928, to May 31, 1928	Total, July 1, 1927, to May 31, 1928
Railway operating revenue	$187,158.24	$214,276.49	$401,434.73
Railway operating expenses	138,655.77	153,643.51	291,899.28
Net revenue from railway operations	48,902.47	60,632.98	109,535.45
Railway tax accruals	24,302.74	20,008.10	44,310.84
Railway operating revenue	24,599.73	40,624.88	65,224.61
Nonoperating income	1,960.37	1,033.04	2,993.41
Gross income	26,560.10	41,657.92	68,218.02
Deductions from gross income	26,360.35	18,635.03	44,995.38
Net income	199.75	23,022.89	23,222.64

On freight other than raw silk complainant now receives 7.25 cents. At the time of the first hearing this division also was 5.25 cents. This increase is reflected in the earnings for 1927, shown above. The facts as set forth establish that complainant is in need of additional revenue, but it is not contended that the traffic under consideration should alone bear the needed increase.

Complainant instances rates of $1.50 and $1.60 on lemon and citrus fruits, and grapes, respectively, from points on the Pacific coast to Hoboken, which commodities require expedited service. Rates in two groups, on canned goods, wool, dry goods, butter and eggs, automobiles, fresh fish, meat, fruit, and numerous other commodities between the points considered are shown to average, respectively, $1.626 and $1.70. The division accorded complainant out of the average rate of $1.626 is 4.4 per cent., as compared with 2.77 per cent. from the rate on raw silk on the basis of the division sought, and 2.66 per cent. under the division of 22 cents. Based on 4.4 per cent. of the total rate complainant's division on raw silk would be 39.6 cents. Under the average rate of $1.70, based on 40,000 pounds, earning per car are $680, out of which complainant receives $29, while under the rate on silk the car earnings are $3600, and under the 22-cent division complainant would receive $88 per car. After allowing complainant a division of 22 cents, the revenue per car-mile to defendants under the rate on silk would be $1.07, as contrasted with 51 cents, the highest revenue per passenger car-mile received by any of defendants. The total cost of handling the traffic under consideration, as itemized by complainant, is as follows:

	Per car Dollars	Per ton Cents	Per 100 pounds Cents
Switching [1]	14.93	74.65	3.73
Terminal insurance	45.00	225.00	11.25
Policing	5.00	25.00	1.25
Unloading and delivering	24.00	120.00	6.00
Total cost	88.93	[2] 444.65	22.23

[1] Based on average cost of handling one car for year 1925.
[2] Based on loading of 40,000 pounds.

The switching cost is arrived at by dividing $187,710, the total switching cost on complainant's line for 1925, by 12,565, the total number of cars handled in switching movement. The total switching cost, dropping the cents, is shown as follows: Rentals $30,908, taxes $45,806, coal $5692, elec-

tric current $3934, repairs to locomotives $4894, depreciation $1668, maintenance of way and structures $25,875, maintenance of equipment $15,591, transportation $8846, and wages $44,496. The total switching cost is shown to be approximately the same for 1926 and 1927. Defendants contend that some of the items used in arriving at the total switching cost, such as rentals and electric current, have no relation to the cost of the specific switching service performed on silk. On a line such as complainant's, however, the specific cost of this switching movement on silk would not be an appreciable amount, if any, below the cost of a switching movement over the entire line. Moreover, the haul of complainant on approximately 75 per cent of its traffic is about the same as here involved.

The 6-cent item shown in the above table represents a charge of 4 cents for unloading and 2 cents for delivery, the amounts charged complainant by the testing company for these services. The item for policing is based on the cost of the services of one guard at $5 per day. The time required to unload depends on the number of shipments, but four guards are usually provided to protect the silk during unloading.

The insurance policies placed by defendants on these shipments contain the following provision: "In case of shipments to points of destination other than New York, this insurance shall terminate immediately upon discharge from railroad car at point of destination. If the car is not discharged within 48 hours after its arrival, the assured will notify the insurance company and pay additional premium thereon if required." Complainant does not participate in the payment of this insurance. In order to indemnify itself against loss complainant insures the silk for the balance of the free time remaining between the time it is unloaded at the testing company's warehouse and delivery. This terminal insurance costs complainant 1.5 cents per $100 of value. The item of 11.25 cents for terminal insurance shown in the above table is based on a value of $300,000

for a 40,000-pound car, but under the values of $6 and $5.24 per pound, shown above, the cost would be $36 and $31.44 per car, and 9 and 7.86 cents, respectively. It is not contended that the insurance rate is excessive, but defendants take the position that this terminal insurance is unnecessary. They state that if complainant would leave the raw silk in the cars for the free-time period, any need of insurance would be obviated. In view of the susceptibility of raw silk to loss and the great risk involved, it seems advisable for complainant to insure itself against loss and to place this silk in an adequate and safe warehouse until delivery to consignee. These are elements to be considered in determining the division of the applicable rate.

The cost to the trunk-line carriers of terminal services for deliveries in New York is stated to be 31 cents per 100 pounds. This service includes floating, unloading and delivering, insurance, and policing. It covers the handling of freight in New York Harbor, in which the average movement is much longer than that here considered. The Erie receives 95 cents per car from its interchange with the West Shore at Weehawken, N. J., to the connection with complainant. The distance of this switching movement is much greater than the one here, but does not entail unloading, storing, or delivering. The Jay Street Terminal at Brooklyn performs the floating operation between the Harsimus Cove float bridges of the Pennsylvania and the former's terminal, 3 miles. The Bush Dock and Bush Terminal, the New York Dock, and the Brooklyn Eastern District Terminal perform similar services. The allowance to these terminals, except the New York Dock, on all traffic except cordwood, grain, ice, coal, and coke is 6.5 cents and on cordwood, grain, and ice 6 cents. In *New York Dock Ry.* v. *B. & O. R. R. Co.*, 89 I. C. C. 695, an allowance of 8 cents on carload traffic and 11 cents on less-than-carload traffic to the New York Dock, among others, was approved. In that case the rates to be divided were much lower than the one here. None of the above terminals handles silk.

The costs of handling raw silk over those of handling other traffic by complainant are shown to be in costs of terminal insurance, policing, unloading, storing, and delivering. These do not include the cost of clerical work entailed in sending notices of arrival, collecting freight charges, and other similar work on this traffic.

Defendants west of the Chicago, Peoria, Ill., St. Louis, Mo., and related gateways request, if any increase in complainant's division is granted, that it be not apportioned to the lines west of those gateways. They point out that the eastern carriers do not participate in the cost of terminal service on the Pacific coast. We consider this to be a reasonable request.

The complaint herein was filed August 6, 1926, and the order is dated November 5, 1927. It provides that of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of the complainant at Hoboken, said complainant shall receive a division of 22 cents, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic; that the order shall take effect as of August 6, 1926, and shall continue in force until the further order of the commission.

It will be noted that the order prescribes a division from the date of the filing of the complaint, and for the future. The rate of which the division is here in issue was not "established pursuant to a finding or order of the commission," and under the holding in the *Brimstone case, supra,* the basis for retroactive application of the division is lacking. The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the act. By paragraph 2 of section 15 of the act "all orders of the commission, other than orders for the pay-

ment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order." An order prescribing a division for the future is not an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927.

Defendants take the position that the facts to which we are required to give consideration under section 15 (6) of the act were not present in the original record; that, therefore, the original order herein was null and void; and that any order herein must speak from the date of a final decision upon the entire record. We do not agree with this contention. The former finding as to the future division is amply supported by the evidence upon the original record.

We find that on and since December 5, 1927, the division received by complainant out of joint rates on silk from points on the Pacific coast to Hoboken, N. J., on its line has been, is, and for the future will be unjust, unreasonable, and inequitable to the extent that it has been, is, or may be less than 22 cents per 100 pounds.

An appropriate order will be entered modifying the order herein of November 5, 1927, to the extent indicated.

BRAINERD, *Commissioner*, concurring in part:

I concur in the majority's report herein. However, I am unable to approve the order proposed to be entered. There is no finding in the report in regard to the reasonableness of the divisions east and west of Chicago, Peoria, St. Louis, and related gateways, although they are collaterally brought in issue by the western lines. The proposed order directs that the complainant's division fixed at 22 cents per 100 pounds "shall be apportioned among all the defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways." I find nothing in the report to support this clause in the order.

PORTER, *Commissioner*, concurring in part:

I concur in the finding that 22 cents would be a just, reasonable, and equitable division to complainant, but on this record I can not concur in the conclusion that the increased division to complainant should be paid by the defendants east of Chicago, Peoria, and St. Louis from the divisions received by them. The evidence as to the divisions accorded those defendants is extremely meager and certainly not convincing that the balance remaining to them after paying from their divisions the increased division to complainant will be just, reasonable, and equitable as required by the statute. On this point the *Brimstone case* referred to by the majority would seem to be controlling.

In *Erie Railroad Co.* v. *A. & V. Ry. Co.*, 98 I. C. C. 268, division 4 prescribed an increased division to the Erie for delivery at its Duane Street station in New York on fruit from the Pacific coast and provided that that increase should be deducted from the through rate prior to the distribution of 72.5 and 27.5 per cent. to carriers west and east of Chicago, respectively. While that case is not controlling, it does indicate that if we had the full facts before us here we might find that the increase in the division to the Hoboken should not be borne entirely by defendants east of Chicago, Peoria, and St. Louis. In *Artemus Jellico R. R. Co.* v. *L. & N. R. R. Co.*, 132 I. C. C. 183, division 3 prescribed an increased division to the complainant there but refused to find by what defendants the increase should be paid, saying:

The Baltimore & Ohio Railroad, and certain of its affiliated lines, excepted to the examiner's report because it did not find that defendant [L. & N.] must absorb out of its earnings all of the increase in divisions which the examiner proposed be accorded complainant on traffic destined to points north of the Ohio River. The only testimony offered with regard to divisions between defendants was that of a witness for the lines which filed the exceptions. From this testimony it appears that under the bases of divisions be-

tween carriers north of the river on the one hand and those south of the river on the other, it has been the practice for the former to absorb any changes in divisions of lateral lines north of the river and for the latter similarly to absorb any changes in divisions of lateral lines south thereof. Although it would appear proper from the record as it now stands that the increase accorded complainant should be absorbed by defendant, the record is not sufficiently developed to justify a definite finding on that question. How the decreased earnings of defendants shall be divided is therefore left for agreement among themselves, failing which appropriate petition may be filed with us.

On the record as it now stands I think a similar course to that followed in the case last cited should be followed here. I am authorized to say that COMMISSIONERS ATCHISON and MCMANAMY concur in this expression.

ORDER.

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION HELD AT ITS OFFICE IN WASHINGTON, D. C., ON THE SEVENTH DAY OF MAY, A. D. 1929.

No. 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

v.

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee and St. Paul Railway Company and H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago and North Western Railway Company; The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Canadian National Railway Company; The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee); The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee); Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee) Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk-Milwaukee Car Ferry Company; The Michigan Air Line Railway; Toledo, Saginaw and Muskegon Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; The Michigan Cen-

tral Railroad Company; Missouri Pacific Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York, Ontario and Western Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railway Company; and The Western Pacific Railroad Company,

Defendants.

It appearing, That on November 5, 1927, division 1 entered its report and order in the above-entitled proceeding, and that on May 14, 1928, this case was reopened for rehearing;

It further appearing, That such rehearing has been had and that the commission on the date hereof has made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report and the report and order of November 5, 1927, are hereby referred to and made a part hereof:

It is ordered, That the said order of November 5, 1927, be and it is hereby modified to read as follows:

It is ordered, That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways.

And it is further ordered, That this order shall continue in force until the further order of the commission.

By the commission.

(Seal) GEORGE B. MCGINTY,
Secretary.

MOTION FOR FURTHER ORDER.

(Filed January 7, 1930.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

Docket No. 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

against

Atchison, Topeka & Sa Fe Railway Co., et al.,
Defendants.

Now comes the complainant in the above-entitled proceeding and respectfully represents as follows:

I. On August 6, 1926, it filed with the Commission its complaint alleging that the division received by it from the joint through rate of $9 per 100 pounds for the transportation of silk from the Pacific Coast to destinations on its line at Hoboken, New Jersey, was unreasonable and unduly low. The Commission after hearing, by a report of Division dated November 5, 1927, determined that the division received by the complainant was unduly low and that a just and reasonable division to be thereafter received by complainant would be 22 cents per 100 pounds. The Commission further found that this division of 22 cents per 100 pounds would have been a just and reasonable division to have been received by complainant on shipments transported by it on and after August 6, 1926, the date of filing its complaint. It thereupon, as of the date of November 5, 1927, entered its order, of which the report was made a part, ordering that "said complainant shall receive a division of 22 cents per 100 pounds," and further ordering that

its order shall "take effect as of August 6, 1926, and shall continue in effect until the further order of the Commission."

II. Complainant believes that in ordering that its said order should take effect as of August 6, 1926, the Commission acted in accordance with the interpretation of Section 15 of the Interstate Commerce Act, which had theretofore been generally accepted and followed by it, to the effect that the provisions of said section authorized the Commission to direct a readjustment of divisions relating back to the date of filing of the complaint in a case where the freight rate to be divided had been subject to the general increases and reductions ordered or approved by the Commission. However, thereafter, on February 20, 1928, the Supreme Court announced its decision in *Brimstone Railroad & Canal Co.* v. *United States*, 276 U. S. 104, holding that said provision of Section 15 authorized the Commission to require a readjustment of divisions relating back to the date of filing the complaint only in a case where the rate to be divided had been specifically prescribed by the Commission and further holding that the Commission's approval or order of general advances or reductions did not amount to such specific prescription of an individual rate as to give the Commission authority to require a readjustment of the divisions thereof relating back to the date of the filing of the complaint seeking the Commission's determination of reasonable divisions.

III. Thereafter the Commission reopened this case for further hearing, presumably in the light of the decision of the Supreme Court above referred to. By its order reopening the case it did not set aside or rescind its previous order, and did not recall its report which clearly indicated a determination by the Commission that the division of 22 cents should be received by complainant on all shipments moving after the date of said original order, to wit, after

the date of November 5, 1927, or as soon thereafter as the order could properly have become effective.

IV. Rehearing was had and thereafter on May 7, 1929, the entire Commission announced its report affirming its previous determination that a reasonable division to be received by complainant was and would be 22 cents per 100 pounds and entered an order modifying its order of November 5, 1927, to conform to the law as determined by the Supreme Court in the *Brimstone* case by ordering that the effective date thereof should be December 5, 1927, thirty days from the date of the order, instead of August 6, 1926. In other words, it corrected its order of November 5, 1927, so that it should be in terms and should take effect as it properly could and should have done when originally entered. The Commission also modified its order of November 5, 1927, with respect to the subdivision of the rate between the lines east and west of the Chicago-Mississippi River gateways, a matter however which does not concern the complainant, whose interest is in the measure of the division of the rate to be received by it.

V. The defendants herein have knowingly and wilfully failed and refused to comply in any respect with the orders of the Commission herein, either the order of November 5, 1927, or said order as modified by the order of May 7, 1929. They have failed and refused to make settlement with the complainant on the basis of the Commission's order or to pay to it out of the through rate on shipments of silk currently transported by the complainant since the Commission's order on rehearing, the division of 22 cents therein ordered, although complainant has made demand upon defendants for payment of the full division ordered by the Commission; and defendants have also failed and refused to adjust divisions with complainant on shipments transported by complainant on and after December 5, 1927, although complainant has made demand in writing upon defendants therefor.

VI. Complainant is informed that the failure and refusal of defendants to comply with said orders of the Commission are due in whole or in part to the contention of defendants, that the Commission was without power by its order of May 7, 1929, to modify or correct its order of November 5, 1927, to make said order effective as of December 5, 1927, although it could undoubtedly have been made effective as of said date when it was originally entered.

VII. Complainant believes that the position of defendants is not well taken and that the Commission, having had power to provide by its order of November 5, 1927, when it was entered that it should take effect December 5, 1927, had the power under Section 16, paragraph 6 of the Act, at a later date to amend and correct said order to comply with the law as subsequently determined by the Supreme Court. In view of defendants' attitude, however, it seems probable that there will have to be litigation to determine the validity of said orders of the Commission and of the liability of the defendants because of their failure and refusal to comply therewith. In the event of such litigation or the continued failure of defendants to comply with said orders, and so long as the divisions of rates on shipments that may hereafter move as well as on shipments transported since December 5, 1927, are determined by said orders, the complainant will continue, on current and future shipments, to be deprived until the conclusion of such litigation of the benefit of the division to which the Commission clearly held it to be entitled.

VIII. Therefore, in order that complainant, with respect to shipments to be hereafter transported shall not longer, and pending any litigation which then may be, be deprived of the benefit of such division because of defendants' contention above indicated with respect to the validity of the Commission's orders of November 5, 1927, and May 7, 1929; and further in order to simplify the issues in such

litigation, but without in any respect conceding the correctness of the defendants' contentions therein, it is submitted that it would be desirable for the Commission now to issue a new order with respect to the division of rates on shipments which may hereafter be transported by complainant, thereby eliminating the division of rates on such shipments from any litigation presenting an issue as to the validity of the previous orders of the Commission in the respects indicated.

WHEREFORE, notice having been given to the defendants of this motion, complainant prays that the Commission on its own motion under powers reserved to it by Section 16 of the Interstate Commerce Act, may forthwith enter in this proceeding an order in terms substantially as follows:

"IT APPEARING that on November 5, 1927 Division 1 entered its report and order in the above entitled proceeding and that on May 14, 1928 this case was reopened for rehearing;

"IT FURTHER APPEARING that such rehearing was had and that the Commission on May 7, 1929 made and filed its report on rehearing containing its findings of fact and conclusions thereon, and entered its order, of which said report was made a part, modifying in certain respects its order of November 5, 1927 but otherwise affirming said order;

"NOW THEREFORE, based upon the findings of fact and conclusions contained in the report of the Commission of November 5, 1927 and its further report of May 7, 1929, which latter is made a part hereof,

"IT IS ORDERED that on and after 1930 (this date to be not less than 30 days from the date of the entry of the order) complainant herein shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, New Jersey, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago

and Peoria, Illinois, St. Louis, Missouri, and related gateways.

"IT IS FURTHER ORDERED that this order shall continue in force until the further order of the Commission.

"AND IT IS FURTHER ORDERED that this order shall take effect as of said , 1930, and as of said date shall, with respect only to the division of rates on shipments delivered to and transported by complainant on and after said date, be in substitution for the aforesaid order of the Commission of November 5, 1927, as modified by the aforesaid order of May 7, 1929, which orders as of the effective date of this order are hereby modified in so far as they would otherwise apply to the division of said rates so as not to apply thereto; but this order shall not be construed as modifying, amending or rescinding said orders of November 5, 1927, or May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to said , 1930, or with respect to the division of rates on any shipments of silk delivered to or transported by complainant prior to said date."

And complainant prays for such other relief in the premises as may be proper.

January 6, 1930.

Respectfully submitted,

PARKER MCCOLLESTER,
LORD, DAY & LORD,
Attorneys for Complainant.
25 Broadway,
New York, N. Y.

DEFENDANTS' ANSWER TO MOTION FOR FURTHER ORDER.

(Filed January 17, 1930.)

BEFORE THE
INTERSTATE COMMERCE COMMISSION

Docket No. 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

against

Atchison, Topeka & Santa Fe Railway Co., et al.,
Defendants.

Come now defendants, carriers in Central Freight Association and Eastern Trunk Line territories, and answer complainant's motion for further order as follows:

These defendants, reiterating the contentions which they have heretofore advanced, that the complainant is not entitled to a division of 22 cents per 100 pounds on the traffic involved in this proceeding, nor, indeed, to anything like this amount, and that the orders heretofore entered purporting to award such a division are illegal and not supported by the evidence and in conflict with the principles laid down by the Supreme Court in the case of Brimstone Railroad & Canal Company v. U. S., 276 U. S. 104, both in the matter of the effective date of the order and otherwise, and also invalid in that they are not restricted to joint rates applicable to transportation wholly within the United States, answer the motion of the complainants for further order by averring that the further order prayed for is not justified by the record, and, if made, would not cure the defects now existing in the orders heretofore entered, an injunction proceeding against the validity of which is now being put under way for presentation to the proper court.

Wherefore defendants pray that the motion for further order in this proceeding be denied.

DEFENDANT CARRIERS IN CENTRAL FREIGHT ASSOCIATION AND EASTERN TRUNK LINE TERRITORIES,

By ALFRED S. KNOWLTON,
Attorney.

January 16, 1930,
143 Liberty Street,
New York, N. Y.

ORDER OF THE COMMISSION.

(Filed February 4, 1930.)

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the fourth day of February, A. D. 1930.

No. 18672.

Hoboken Manufacturers' Railroad Company,
Complainant,

v.

The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; Canadian Pacific Railway Company; The Central Railroad Company of New Jersey; Chicago, Burlington & Quincy Railroad Company; Chicago, Milwaukee and St. Paul Railway Company and H. E. Byram, Mark W. Potter, and Edward J. Brundage, Receivers; Chicago and North Western Railway Company; The Chicago, Rock Island and Pacific Railway Company; The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; The Delaware, Lackawanna and Western Railroad Company; Erie Railroad Company; Canadian National Railway Company; The Champlain and St. Lawrence Railroad Company (Canadian National Railway Company, Lessee); The United States and Canada Rail Road Company (Canadian National Railway Company, Lessee); The Chicago, Detroit and Canada Grand Trunk Junction Railroad Company (Canadian National Railway Company, Lessee); Cincinnati, Saginaw and Mackinaw Railroad Company (Canadian National Railway Company, Lessee); Detroit, Grand Haven and Milwaukee Railway Company; Grand Trunk Western Railway Company; Grand Trunk-Milwaukee Car Ferry Company; The Michigan

Air Line Railway; Toledo, Saginaw and Muskegon Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Lehigh Valley Railroad Company; The Michigan Central Railroad Company; Missouri Pacific Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; New York, Ontario and Western Railway Company; Northern Pacific Railway Company; The Pennsylvania Railroad Company; Southern Pacific Company; Union Pacific Railroad Company; Wabash Railway Company; and The Western Pacific Railroad Company,

Defendants.

Upon consideration of the complainant's motion for a further order and of the defendants' answer thereto, and upon further consideration of the record in the above-entitled proceeding,

IT APPEARING, That on November 5, 1927, division 1 entered its report and order in the above-entitled proceeding, and that on May 14, 1928, this case was reopened for rehearing;

IT FURTHER APPEARING, That such rehearing has been had and that the Commission on May 7, 1929, made and filed a report on rehearing containing its findings of fact and conclusions thereon, and entered its order modifying in certain respects its said order of November 5, 1927, which said reports of November 5, 1927, and May 7, 1929, are hereby referred to and made a part hereof;

IT IS ORDERED, That on and after March 10, 1930, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which partici-

pate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways.

It Is Further Ordered, That this order shall continue in force until the further order of the Commission.

And It Is Further Ordered, That the aforesaid orders of November 5, 1927, and May 7, 1929, be and they are hereby modified so as not to apply to the division of said rates on shipments delivered to and transported by said complainant on and after March 10, 1930, but this order shall not be construed as modifying, amending or rescinding said orders of November 5, 1927, and May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to March 10, 1930, or with respect to the division of rates on any shipments delivered to or transported by complainant prior to said date.

By the Commission:

George B. McGinty,

(Seal) *Secretary.*

[Clerk's certificate to foregoing transcript omitted in printing.]

In Supreme Court of the United States

Statement of points to be relied upon and designation of the parts of the record to be printed

Filed Mar. 28, 1931

Come now the appellants in the above-entitled cause and state that the points upon which they intend to rely in this court in this case are as follows:

Point 1. The commission, in making its order of November 5, 1927, fully complied with the requirements of section 15 (6) of the interstate commerce act as to the matters to be considered by it.

Point 2. The commission's order of November 5, 1927, being an order as to the division to be received by the Hoboken Manufacturers' Railroad Company out of the joint through rate for the transportation of one commodity alone, silk, was amply supported by substantial evidence, including sufficient evidence on the matters referred to in section 15 (6) of the interstate Commerce act.

Point 3. The commission's new order of November 5, 1927, constituted a valid determination of the future just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company out of the joint through rate for the transportation of silk, and was a valid order in so far as it fixed the division of this rate to be received by that company on and after 60 days from its date, or December 5, 1927.

Point 4. The commission, in making its order of May 7, 1930, fully complied with the requirements of section 15 (6) of the interstate commerce act, as to the matters to be considered by it, and its order was amply supported by substantial evidence, including sufficient evidence as to the matters referred to in said section.

Point 5. The commission's order of May 7, 1930, properly modified its former order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 5, 1928, and is a valid order within the power of the commission.

The appellants further state that, upon the hearing of this cause in the proceedings before the Interstate Commerce Commission, and as contained in the record before this court, there is sufficient of the matter contained in the record before this court which is material to the questions involved in this appeal, and that the parts of the record before said commission which are not now available for the use of this court, need not be printed; and that the following parts of the record as filed in the court need be printed by the clerk upon the hearing of the case, to wit:

Docket entries

Petition filed by petitioners

Order to show cause issued

Answer of United States

Petition of Hoboken Manufacturers' Railroad Co.

Order to show cause issued

Answer of Hoboken Manufacturers' Railroad Co.

Intervention of Interstate Commerce Commission

Answer of Interstate Commerce Commission

Minutes of hearing on motion for permanent injunction

Proceedings pending petition

Affidavit of service

Petition for appeal

Order allowing appeal

Acknowledgment by Attorney General of service of notice

Citation

Bond on appeal

Acknowledgment of service of notice of appeal

Acknowledgment of service of citation

Acknowledgment of service of order allowing appeal

Bond on appeal

Acknowledgment of service of praecipe

Certificate of clerk of District Court

(Signed) ELBERT B. COLLINS,
Special Assistant to the Attorney General.
J. STANLEY PAYNE,
Solicitor for Interstate Commerce Commission.
PARKER MCCOLLESTER,
Solicitor for Hoboken Manufacturers' Railroad Company.

Service of the above statement is hereby acknowledged this [illegible] 1927.

(Elmer S. Dennis, Jr.)
ELMER S. DENNIS, JR.,
Solicitor for Baltimore & Ohio Railroad Company et al.,
Appellees.

[Endorsed on cover:] File No. 35,716. New Jersey, D. C. U. S. Term, No. [illegible]. The United States of America, Interstate Commerce Commission, Hoboken Manufacturers' Railroad Company, Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Filed March 14, 1928.

[illegible] of the record as filed in the court need be printed for the hearing of the case.

[illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 793

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY, appellants

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, appellants submit herewith their statement showing the basis of this Court's jurisdiction in the above-entitled cause:

A

STATUTES

Section 238 of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 939) paragraph (4) (U. S. C. Title 28, Sec. 345).

Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 208, 219, 220; U. S. C. Title 28, Sec. 47a).

B

DECREE

The decree sought to be reviewed was entered on December 19, 1930 (R. 87, 88.)[1]

The petition for appeal was filed and the order allowing the appeal was entered February 16, 1921. (R. 92, 93.) Notice of appeal with service acknowledged was filed on February 17, 1931. (R. 99.) The case was docketed in this Court on March 14, 1931.

C

THE NATURE OF CASE AND RULING BELOW

This suit was brought to enjoin, set aside, suspend, and annul certain orders of the Interstate Commerce Commission made (R. 3) and entered November 5, 1927 (R. 155, 160, 161), May 7, 1929 (R. 269, 302, 303) and February 4, 1930 (R. 312, 313), respectively, in a proceeding known as Docket 19973, *Hoboken Manufacturers' Railroad Company, complainant, v. The Atchison, Topeka & Santa Fe Ry. Co., et al., defendants*, 132 I. C. C. 579; 156 I. C. C. 330.

The proceeding before the Commission was instituted by the Hoboken Manufacturers' Railroad Company by complaint for the purpose of obtaining a just, reasonable, and equitable division of a

[1] All references in the record are to the pages of the certified transcript of record prepared by the Clerk of the District Court and filed with the Clerk of this Court. The record is not printed.

joint through rate for the transportation of [illegible] from Pacific Coast ports to [illegible]

A hearing (R. 122–206) and rehearing (R. [illegible]–396) were had before the Commission and three orders were issued by the Commission, all of them determining and prescribing for the [illegible] an increased division of the joint through rate involved. (The first order, R. 267; the second order, R. 395, 396; the third order, R. 406–407.)

The appellees in their petition to the court below alleged, *inter alia*, that all three orders of the Commission were invalid because not supported by sufficient evidence and because the Commission had failed to comply with the requirements of Section 15(6) of the Interstate Commerce Act. It was also alleged that the first two orders issued by the Commission were invalid because they were given retroactive effect in violation of said Section 15 (6) of the Interstate Commerce Act.

Hearing was had before a statutory court in which sat Circuit Judge Davis, and District Judges Runyon and Aviz. (R. 77.) A full opinion was given (R. 77) holding that the first two orders of the Commission were null and void, and a final decree was entered permanently annulling, enjoining, and setting them aside. The third order was held valid. (R. 87, 88.)

D

CASES

Brimstone R. R. Co. v. *U. S.*, 276 U. S. 104; *U. S.* [illegible] *& So. Ry. Co.*, 265 U. S. 276; *New Eng-*

Division Case, 261 U. S. 184; *Beaumont, Sour Lake & Western Ry. Co.* v. *U. S.*, 282 U. S. 74.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the aforementioned statutes set out in paragraph A of this

THOMAS D. THACHER,
Solicitor General.

ELMER B. COLLINS,
Special Assistant to the Attorney General.

J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.

PARKER MCCOLLESTER,
Solicitor for Hoboken Manufacturers' Railroad Company.

FILE COPY

FILED
OCT 3 1931
CHARLES ELMORE CROPLEY
CLERK

No. 33

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLANTS

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 33

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, appellants,

v.

BALTIMORE & OHIO RAILROAD COMPANY ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court (R. 39) is reported in 43 Fed. (2d) 603. The reports of the Interstate Commerce Commission (R. 9, 14) are reported in 132 I. C. C. 579 and 155 I. C. C. 330.

JURISDICTION

The decree of the District Court was entered December 19, 1930. (R. 44.) Petition for appeal

was filed February 16, 1931, and was allowed on the same day. (R. 47, 48.)

Jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C. Sup. III, Title 28, Sec. 47a), and Subsection 4, Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, Sec. 345).

QUESTIONS PRESENTED

The principal question presented is whether the Commission's order of November 5, 1927, prescribing the reasonable division to be received by the Hoboken Manufacturers' Railroad Company out of the joint rate on silk from Pacific Coast ports of import to Hoboken, N. J., was a valid order in so far as it prescribed the future division. The order, as originally entered, prescribed the division retroactively to the date of the complaint, August 6, 1926, as well as for the future. Upon rehearing, it was determined that the order was beyond the Commission's jurisdiction to the extent that it applied retroactively but that it was valid in so far as it prescribed the division for the future, and an amendatory order was entered May 7, 1929, modifying the order of November 5, 1927, so as to change its effective date from August 6, 1926, to a date 30 days after its issuance, or December 5, 1927. Subordinate questions upon which the validity of the order depends are:

Whether the subsequent determination of the invalidity of the retroactive part of the order of November 5, 1927, had the effect of rendering the order totally null and void so as to strike down not only the admittedly invalid part relating to the past but also the separable part having application strictly for the future.

Whether the order of May 7, 1929, amending the order of November 5, 1927, by changing its effective date to December 5, 1927, was within the Commission's power and valid.

Whether the order of November 5, 1927, was supported by substantial evidence showing the division in issue to be unjust, unreasonable, and inequitable and whether the evidence was sufficient to enable the Commission to give due consideration to the matters specified in Section 15 (6) of the Act.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

STATEMENT

This is an appeal from a final decree (R. 44) of the court below annulling and permanently enjoining two orders of the Interstate Commerce Commission, entered November 5, 1927 (R. 12) and May 7, 1929 (R. 22), in a proceeding entitled No. 18672, *Hoboken Manufacturers' Railroad Company* v. *Atchison, Topeka & Santa Fe Railway Company et al.* A third order in the same proceeding (R. 23–

25), dated February 4, 1930, was upheld and the relief prayed in respect of that order was denied (R. 45). No cross-appeal has been taken from the action of the court sustaining this third order.

Proceedings Before the Commission

The proceeding before the Commission was initiated by the filing, on August 6, 1926, of a complaint, under Section 13 (1) of the Interstate Commerce Act, by the Hoboken Manufacturers' Railroad Company, herein called the Hoboken, alleging that its division of 5¼ cents per 100 pounds of the joint rate on silk from Pacific Coast ports to Hoboken, N. J., of $9 per 100 pounds, was unjust, unreasonable, inequitable, and inadequate, in violation of Section 1 (4) of the Interstate Commerce Act. (R. 55, 60.)

The Hoboken is a switching and terminal railroad located entirely within the city limits of Hoboken, N. J., its tracks extending along the Hudson River from 2nd Street to 18th Street in that city. (R. 86; Exhibit No. 1, R. 190.) It is a common carrier engaged in the general transportation of freight in interstate commerce (R. 68, 86, 169–170) and is subject to the provisions of the Interstate Commerce Act. It has direct track connections with the Erie Railroad at 18th Street, over which it interchanges freight with the Erie and, through the intermediary of the Erie, with various other railroads whose lines reach Hoboken. (R. 70.) It is a participating carrier in various tariffs

of joint rates applying between points on its line and points on the lines of other carriers, including the tariff publishing the joint transcontinental rate on silk. (R. 69, 139–140.)

The defendants named in the complaint were 12 western carriers and 24 eastern carriers forming the transcontinental routes over which the silk shipments are transported and participating with the Hoboken in the $9 rate. (R. 55, 139.) Included among the defendants were a number of the largest railroad systems in the country.

The United States Testing Company, conducting a laboratory service for the weighing and testing of silk, and maintaining a textile warehouse at Hoboken, on the rails of the Hoboken (R. 70–71, 110, 112; Ex. I, R. 190), intervened in support of the complaint (R. 64). Under an arrangement entered into between the Hoboken and the Testing Company, the latter acts as agent for the Hoboken in uploading, storing during the free time, and delivering to consignees, all shipments of silk routed for delivery by the Hoboken. (R. 70–71, 76–78, 90, 92, 93, 116, 118–121, 122.)

At the time of the complaint the War Department of the United States was the sole owner of the capital stock of the Hoboken, having acquired it to facilitate operations in connection with the World War (R. 69), and the Secretary of War also intervened in support of the complaint. (R. 64.) Since then the War Department has sold its stock to private individuals. (R. 243.)

At the opening of the hearing held at New York, N. Y., November 22, 1926 (R. 63–206), hereinafter referred to as the first hearing, the Hoboken amended its complaint so as to ask that any increase in its division granted by the Commission be made effective as of the date of the complaint, August 6, 1926. No objection was interposed by the defendants to this amendment. (R. 66.)

The classification rating on raw silk, value exceeding $1 per pound, by ordinary freight-train service, is 1½ times first class. (R. 136.) This import silk, however, is handled in special trains, and the applicable rate of $9 per 100 pounds is a special commodity rate, voluntarily established and maintained by the carriers, higher than the classification basis.[1] (R. 136.) This rate is not a carload rate but is applicable to any quantity. (R. 77.) It applies from Pacific Coast ports to New York and points taking New York rates, including Hoboken. (R. 139–140.)

The primary division of the $9 rate is 72½ per cent to the lines west of Chicago and related gateways and 27½ per cent to the lines east thereof. (R. 134–135; 145–146.) The Hoboken's division is a subdivision of the primary division of the eastern lines, and, when it was 5¼ cents per 100 pounds, amounted to ¼ of 1 per cent of the rate. (R. 59.) Of the $9 rate, therefore, the western lines received $6.52½ per 100 pounds, the eastern trunk lines

[1] Cf. *Director General v. Viscose Co.*, 254 U. S. 498, 502.

$1.42½ per 100 pounds, and the Hoboken 5¼ cents per 100 pounds. (R. 135–136.)

The service performed by the Hoboken as delivering or terminal carrier of the silk shipments is one necessarily involving considerable expense. The four major items of expense incurred in that connection are switching, terminal insurance, policing, and unloading and delivering. These items, shown by witnesses for the Hoboken in great detail, and referred to hereinafter more particularly, aggregated slightly more than 22 cents per 100 pounds. (Ex. 2, R. 139.)

Since these items together constituted the actual cost of the Hoboken's service, aggregating approximately 22 cents per 100 pounds, it follows that on all shipments the Hoboken was compelled to handle at the 5¼-cent division it suffered an actual loss of approximately 17 cents per 100 pounds.

The Hoboken at no time agreed to 5¼ cents as its division on silk. Prior to the filing of its complaint with the Commission on August 6, 1926, it had not handled any shipments of this commodity. (R. 72.) It did not begin to do so until after the United States Testing Company established its plant on its line. About 30% of the silk going to the New York metropolitan district is warehoused, weighed, or tested by the Testing Company. (R. 110–111, 123.) During August, 1926, that company moved from Hudson Street in lower Manhattan to its new location, at 15th Street and Park Avenue in Hoboken, on the rails of the Hoboken, where it had

constructed a new warehouse and laboratory. (R. 112.) The first silk shipments moved over the Hoboken August 14, 1926. (R. 125, 192.) At that time its division on all less-than-carload freight (silk is that type of traffic, R. 71) was $1.05 per ton, or 5¼ cents per 100 pounds (R. 71-72), but that division was not one which contemplated the unusual expense incident to the handling of silk, with its extraordinary value and the risks attendant thereto (R. 71-72, 74, 103).

Investigation made by the Hoboken prior to the filing of its complaint indicated the expensive nature of the terminal service required in the delivery of this commodity. (R. 59.) It averred in its complaint that "special police protection must be provided, as well as protection against theft, fire, burglary, and damage, by insurance," and that "the insurance complainant will have to pay on this traffic will be at the same rate as now paid by defendants at their own terminal," or approximately 11¼ cents per 100 pounds. (R. 59.)

Study of the various items of expense entering into the terminal handling of silk indicated to the Hoboken that total expense would be about 25 cents per 100 pounds, including the insurance expense as well as policing, switching, and unloading and delivering. (R. 59-60.)

As further averred in its complaint, it applied to the defendants for a division of 25 cents but they "declined to grant complainant's request for any increase whatever in the allowance for handling

raw silk over the allowances for general merchandise set forth in paragraph IV, notwithstanding that it is common knowledge that terminal expenses on silk traffic are much greater than on general merchandise." (R. 60.)

Shortly after the complaint was filed the shipments began to move, routed by the shippers over the Hoboken as delivering carrier (R. 118–119), and the Hoboken, being a party to the joint tariff naming the $9.00 rate on silk (R. 69, 139), and in view of its duties and responsibilities as a common carrier, received, transported, and delivered the shipments, and was compelled to accept as its division, constituting its total compensation for the services it performed, the sum of 5¼ cents per 100 pounds.[1]

The Commission, Division 1, in its report of November 5, 1927, found that the Hoboken's division had been since August 6, 1926, and for the future would be, unjust and unreasonable and that the just and reasonable division would be not less than 22 cents per 100 pounds. (R. 12.)

Its order of November 5, 1927 (R. 12–13), issued as part of the report, required that the Hoboken be

[1] The first hearing, Nov. 22, 1926 (R. 63), was held 3½ months after the filing of the complaint, but before the original report and order was issued, November 5, 1927, over a year elapsed. Meanwhile the Hoboken was forced to handle the shipments at the inadequate division of 5¼ cents per 100 pounds. Even after the issuance of that order the Hoboken did not receive the increased division, for the defendants in the Commission proceeding (including appellees) did not obey that order, and it was not until the third order of the Commission became effective on March 10, 1930, that the Hoboken finally received an adequate division.

accorded a division of 22 cents, and provided that the order should take effect as of August 6, 1926, and continue in force until the further order of the Commission.

Proceedings Upon Rehearing

February 20, 1928, this court rendered its opinion in *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, which indicated that the order of Division 1 of November 5, 1927, in the present case might be erroneous in so far as it prescribed a retroactive division, and the Commission on its own motion, by order dated May 14, 1928 (R. 214), reopened the present case for rehearing. Further hearing was held at New York, N. Y., July 13, 1928. (R. 215–340.)

In its report upon rehearing (R. 14), dated May 7, 1929, the Commission found that its earlier action in making the increased division retroactive to the date of the complaint was erroneous, but further found that the order of November 5, 1927, though invalid in its retroactiveness, was valid in so far as it prescribed the division for the future and, by its order of May 7, 1929 (R. 22), amended the order of November 5, 1927, by changing its effective date from August 6, 1926, to December 5, 1927, or 30 days after the date on which the order was issued.

The defendants took the position at the rehearing that the facts to which the Commission is required to give consideration under Section 15 (6)

of the Act were not present in the original record; that, therefore, the original order of Division 1 was null and void; and that any order entered must speak from the date of a final decision upon the entire record. The Commission overruled this contention, holding that the earlier finding as to the *future* division "is amply supported by the evidence upon the original record." (Report upon rehearing, R. 20.)

In its report upon rehearing, the Commission, referring to the November '27 order, said:

> It will be noted that the order prescribed a division from the date of the filing of the complaint, and for the future. The rate of which the division is here in issue was not "established pursuant to a finding or order of the Commission," and under the holding in the *Brimstone Case, supra,* the basis for retroactive application of the division is lacking. The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the Act. By paragraph 2 of section 15 of the Act "all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than 30 days, and shall continue in force until its further order." An order prescribing a division for the future is not

an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927. (R. 20.)

Following this finding, the order of May 7, 1929, provided:

> *It is ordered,* That the said order of November 5, 1927, be, and it is hereby, modified to read as follows:
>
> *It is ordered,* That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint east-bound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways. (R. 23.)

By petition dated January 7, 1930 (R. 356), the complainant informed the Commission that "the defendants herein have knowingly and wilfully failed and refused to comply in any respect with the orders of the Commission herein, either the order of November 5, 1927, or said order as modified by the order of May 7, 1929. They have failed and refused to make settlement with the complainant on the basis of the Commission's order or to pay to it out of the through rate on shipments of silk currently transported by the complainant since the Commission's order on rehearing, the division

of 22 cents therein ordered, although complainant has made demand upon defendants for payment of the full division ordered by the Commission; and defendants have also failed and refused to adjust divisions with complainant on shipments transported by complainant on and after December 5, 1927, although complainant has made demand in writing upon defendants therefor. Complainant is informed that the failure and refusal of defendants to comply with said orders of the Commission are due in whole or in part to the contention of defendants, that the Commission was without power by its order of May 7, 1929, to modify or correct its order of November 5, 1927, to make said order effective as of December 5, 1927, although it could undoubtedly have been made effective as of said date when it was originally entered. * * * Complainant believes that the position of defendants is not well taken and that the Commission, having had power to provide by its order of November 5, 1927, when it was entered that it should take effect December 5, 1927, had the power under section 16, paragraph 6 of the Act, at a later date to amend and correct said order to comply with the law as subsequently determined by the Supreme Court. In view of defendants' attitude, however, it seems probable that there will have to be litigation to determine the validity of said orders of the Commission and of the liability of defendants because of their failure and refusal to comply therewith. In the event of

such litigation or the continued failure of defendants to comply with said orders, and so long as the division of rates on shipments that may hereafter move, as well as on shipments transported since December 5, 1927, are determined by said orders, the complainant will continue, on current and future shipments, to be deprived until the conclusion of such litigation of the benefit of the division to which the Commission clearly held it to be entitled." (R. 358, 359.)

"Therefore," the petition continued, "in order that complainant, with respect to shipments to be hereafter transported shall no longer, and pending any litigation which there may be, be deprived of the benefit of such division because of defendants' contention above indicated with respect to the validity of the Commission's orders of November 5, 1927, and May 7, 1929; and further in order to simplify the issues in such litigation, but without in any respect conceding the correctness of the defendants' contentions therein, it is submitted that it would be desirable for the Commission now to issue a new order with respect to the division of rates on shipments which may hereafter be transported by complainant, thereby eliminating the division of rates on such shipments from any litigation presenting an issue as to the validity of the previous orders of the Commission in the respects indicated." (R. 359–360.)

Granting the request of said petition (after answer thereto by defendants, R. 362), the Commis-

sion on February 4, 1930, issued an order providing that on and after March 10, 1930 (more than 30 days subsequent to the date of the order), said complainant shall receive a division of 22 cents per 100 pounds out of the rates in question (R. [illegible]); and said order further povided:

> That the aforesaid orders of November 5, 1927, and May 7, 1929, be, and they are hereby modified so as not to apply to the division of said rates on shipments delivered to and transported by said complainant on and after March 10, 1930, but this order shall not be construed as modifying, amending or rescinding said orders of November 5, 1927, and May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to March 10, 1930, or with respect to the division of rates on any shipments delivered to or transported by complainant prior to said date. (R. 366.)

Proceedings in Court Below

Petition to enjoin and set aside all three orders (R. 2) was filed March 11, 1930, in the court below by 23 of the 36 carriers, defendants in the Commission proceeding, to whom the orders were directed. The petition alleged the invalidity of the November '27 order on the ground that the evidence on which that order was based was restricted to the facts and circumstances immediately relating to the services performed by the Hoboken and included no facts

or circumstances whatever in connection with any of the factors enumerated in Section 15 (6) relative to the other carriers (defendants) participating in the traffic. The petition also alleged that said order, as well as the May 29 order, was invalid because retroactive.

Further the petition alleged that all three orders were invalid because they failed to exempt shipments moving partly through Canada, but this objection was not pressed in view of the Commission's answer calling attention to the provisions of the Interstate Commerce Act which make it plain that the Commission has no jurisdiction over transportation in foreign countries and suggesting that the Commission's orders were not intended to and should be interpreted as not prescribing divisions of joint international rates. (R. 36–37.)

Answers were filed by the United States (R. 26) and by the Hoboken (R. 29), which intervened (R. 27–29), as well as by the Commission.

After hearing on June 17, 1930 (R. 38), the court rendered its opinion September 19, 1930 (R. 39), holding the first two orders invalid on the grounds alleged in the petition, but sustaining the third order, except in so far as it directed that the two previous orders should remain in effect until the effective date of the third order, March 10, 1930.

From the final decree (R. 44) the United States, the Commission, and the Hoboken appealed (R. 46–50).

SPECIFICATION OF ERRORS TO BE URGED

The following errors of the District Court are urged herein:

1. In setting aside, annulling, and permanently enjoining the Commission's orders of November 5, 1927, and May 7, 1929.

2. In holding that the order of November 5, 1927, was void because not supported by sufficient evidence to enable the Commission to give due consideration to the matters specified in section 15 (6) of the Interstate Commerce Act.

3. In not holding that the order of November 5, 1927, as amended by the order of May 7, 1929, was a valid order in so far as it fixed the future just, reasonable, and equitable division to be received by the Hoboken.

4. In holding that the Commission's order of May 7, 1929, because of the absence of evidence required by the applicable statute to support it, as well as because of its retroactive feature, was null and void.

5. In not holding that the Commission's order of May 7, 1929, which corrected or modified the order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 6, 1926, was a valid order.

6. In not dismissing the petition.

SUMMARY OF ARGUMENT

I. The order of November 5, 1927, though beyond the Commission's jurisdiction in its retroac-

tive part, was a valid order in so far as it prescribed the future division to be received by the Hoboken and was susceptible of amendment so as to eliminate the separable retroactive part and yet save the valid part having application strictly to the future. *Louisville & Nashville R. R.* v. *Sloss-Sheffield Co.*, 269 U. S. 217, 225.

Section 16a of the Act expressly authorizes the Commission to reverse, change, or modify an order when, after rehearing, if appears that the order is in any respect unwarranted.

II. The order of November 5, 1927, was supported by substantial evidence introduced at the first hearing, which clearly established that the Hoboken's division of 5¼ cents was unreasonably low and less than its cost of service, which aggregated approximately 22 cents per 100 pounds.

The expenses incurred by the Hoboken as delivering carrier of the silk shipments are 3.73 cents for switching, 1¼ cents for policing, 6 cents for unloading and delivering, and 11¼ cents for terminal insurance, aggregating 22 cents per 100 pounds. The item of terminal insurance alone was nearly double its division.

The reasonableness of these costs is indicated by the fact that they are no greater than the costs incurred by the defendants themselves in making delivery of silk shipments in New York. Formerly, the silk shipments now handled by the Hoboken were delivered in Manhattan. Then the trunk line defendants bore costs aggregating 31 cents per 100

pounds in making terminal delivery, including a cost of 12½ cents per 100 pounds for floating the silk across New York harbor. Those carriers are now saved those costs and the Hoboken's increased division of 22 cents per 100 pounds results in a saving to them of 9 cents per 100 pounds.

The evidence demonstrated the inadequacy of the Hoboken's ordinary less-than-carload freight division of 5¼ cents when applied to silk, with its extraordinary value, risks, and increased expenses incident thereto.

It is clear that the 5¼-cent division, if prescribed by the Commission, would have been confiscatory because so far below the cost of the Hoboken's service. *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 596; *New England Divisions case*, 261 U. S. 184, 195; *United States* v. *Abilene & So. Ry. Co.* (*Orient divisions case*), 265 U. S. 274, 285; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 87.

As held in the *Brimstone case*, page 116, and *Orient Divisions case*, page 284, cost of service to one carrier is not the only factor to be considered in determining just divisions, and it was not the only factor considered in this case, but when it is shown, as in this case, that the cost of the service to one carrier is greater than its division, with the result that the continuance of that division compels the carrier to carry the freight at a loss, then the other factors can not constitutionally be given controlling weight. *New England Divisions case*, at pp.

194, 195; *Dayton-Goose Creek Ry.* v. *United States*, 263 U. S. 456, 477; *Orient Divisions case*, pages 284–285.

III. The evidence introduced at the first hearing sufficiently developed the matters to which the Commission is required to give due consideration by section 15 (6) of the Act, and supports the Commission's original order. The evidence before the Commission relating to the efficiency with which the carriers concerned are operated had particular reference to the transcontinental silk traffic, since the sole issue was the reasonableness of the Hoboken's division of the one rate, $9 per 100 pounds, applicable only on silk transported transcontinentally. The Hoboken's petition to the Commission did not ask for an increase in its divisions on all traffic on the ground that it was in need of additional aggregate revenue, but was predicated upon the fact that the division on import silk was below the cost of its service. Therefore, the case at bar is to be distinguished from cases like *New England Divisions case* and the *Orient Divisions case*, where the divisions of the rates on all traffic were in issue and in which the court held that in determining what the divisions should be the Commission may, in the public interest, take into consideration the financial needs of a weaker road, and that it may be given a division larger than justice merely as between the parties would suggest, in order to maintain it in effective operation as part of an adequate transportation system, *pro-*

vided the share left to its connections is adequate to avoid a confiscatory result. In such cases there must be full evidence as to the efficiency with which the carriers concerned are operated, to be considered in connection with evidence as to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return, to the end that the financial needs of one carrier may not be satisfied at the expense of another carrier also needy. But where the evidence discloses, as in the case at bar, that the division accorded by a large group of trunk-line carriers to a short delivering carrier out of a single joint rate on one commodity only is *below the cost of the service* necessarily rendered by the short carrier in connection with that commodity and hence not adequate to avoid a confiscatory result, evidence as to the general efficiency of the trunk-line carriers is unnecessary because in no event could they be relieved of the obligation to accord the short line, out of a rate voluntarily established and maintained by them, and, therefore, presumably high enough to be profitable, a division commensurate with the cost of the short line's service, on the ground that they, though efficiently operated, are in need of additional revenue. No such need could be satisfied through a division to the short line inadequate to cover that line's actual expenses of handling the commodity.

It was shown that the silk traffic is efficiently handled by the transcontinental carriers. The

record established that the Hoboken's operation is efficient and economical. Its arrangement with the Testing Company to unload, store, and deliver the silk to consignees was shown to be economically sound and in the interest of a safe and efficient operation.

There was general evidence of the amount of revenue required to pay the respective operating expenses of the transcontinental carriers, their taxes, and a fair return on their railway property. Since delivery of the silk traffic by the Hoboken saves the trunk-line carriers terminal expenses of 31 cents per 100 pounds, which they formerly incurred in making delivery at the New York pier stations, the granting of an increased division of 22 cents to the Hoboken does not adversely effect the net revenues of the other carriers. Evidence conclusively establishing that the Hoboken's division on silk was far below the cost of its service demonstrated its need for additional revenue from this traffic.

There was other evidence relating to the importance to the public of the transportation services of the carriers concerned, whether any particular carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate.

ARGUMENT

I

The order of November 5, 1927, applied both retroactively and in futuro. The subsequent determination of the invalidity of its retroactive part did not destroy its requirements as to the future

It is conceded that the order of November 5, 1927, is invalid in so far as it prescribed the Hoboken's division retroactively to the date of the complaint. If the order had been one which fixed the *past* division only it no doubt would have been totally null and void. It is clear, however, that the order applied for the future as well as the past. It provided—

> that of the joint, eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant, at Hoboken, N. J., said complainant *shall* receive a division of 22 cents per 100 pounds, * * *.

This was followed by the provision that the order should take effect as of August 6, 1926, "*and shall continue in force until the further order of the Commission.*" (Italics ours.) (R. 13.)

It is to be noted, too, that the order was based upon a finding of future as well as past unreasonableness of the Hoboken's division. The finding in the report, referred to in the order and made a part hereof, reads:

> We find that on and since August 6, 1926, the division received by the Hoboken out

> of joint rates on silk from points on the Pacific coast to destinations upon its line was, is, *and for the future* will be unjust and unreasonable in that it was, is, *and for the future* may be less than 22 cents per 100 pounds. (Italics ours.) (R. 12.)

The report and order, read together, leave no room for doubt that it was the intention of the Commission to prescribe the future division to be received by the Hoboken, as well as the past.

The court below held the November, 1927, order to be invalid on two grounds, first, because it was retroactive; second, because the evidence offered at the hearing which preceded that order was not sufficient to enable the Commission to comply with the requirements of section 15 (6). (Opinion, R. 41; see assignment of errors, R. 46–47.)

Subsequent parts of this brief refer to the evidence introduced at the first hearing, and show that it clearly established the unreasonableness and unjustness of the Hoboken's division and that it sufficiently developed the matters to which the Commission is required to give due consideration by section 15 (6). This being true, it would follow that the November '27 order was a valid order in so far as it prescribed the future division, unless the invalidity of its retroactive feature automatically destroyed the order *in toto*. It would not appear that it did, because the part of the order relating to the past was clearly separable from the part having application to the future, and the

retroactive portion could be set aside and annulled without striking down the more important provision as to the future. Under the Commerce Court Act, as amended by the Urgent Deficiencies Act, the specially constituted District Courts have jurisdiction to enforce, suspend, or set aside, *in whole or in part,* any order of the Commission. (Cf. *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 49.) It was, therefore, within the power of the court below to have annulled that part of the November '27 order that was retroactive and sustained the part that related to the future, even in the absence of the Commission's order of May 7, 1929 (entered prior to the institution of the court proceeding), amending the November '27 order so as to make it apply only for the future.

The November '27 order was susceptible of amendment so as to eliminate the separable retroactive part and yet save the valid part having application strictly to the future. As held in *L. & N. R. R.* v. *Sloss-Sheffild Co.,* 269 U. S. 217, 225,

> The Commission, like a court, may, upon its own motion or upon request, correct any order still under its control * * *.

1. The order of May 7, 1929, amending the order of November 5, 1927, so as to eliminate its retroactive part and make it apply for the future only, beginning 30 days after its date, was within the power of the Commission under section 16a of the Act and was valid

Section 16a of the Act, authorizing the Commission to grant rehearings, provides that no applica-

tion for rehearing "shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." Applications were filed by the carriers defendant in the Commission proceeding for reargument or reconsideration and modification of the Commission's original order in the proceeding. (R. 214.) The Commission did not grant those applications but upon consideration of them reopened the proceeding on its own motion for rehearing, by order dated May 14, 1928. (R. 214.) That order did not amend, modify or set aside the November 1927 order,[3] and therefore it must be deemed that that order remained in full force and effect.[4]

Section 16a provides that "if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly."

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[3] There was no order of dismissal in this proceeding as there was in *Minneapolis R. R.* v. *Peoria Ry.*, 270 U. S. 580, 584.

[4] Cf. *United States* v. *Abilene & Southern Ry.*, 265 U. S. 274, 282. Under section 15 (2) of the Act, orders of the Commission such as the November 1927 order here in question continue in force until the Commission's further order, "unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction." At the time of the issuance of the May 1929 amendatory order, there had been no Commission or court order suspending, modifying, or setting aside the November 1927 order.

After the rehearing in the case at bar the Commission concluded that its original order was unwarranted in so far as it applied retroactively, and therefore, by its order of May 7, 1929, amended the original order so as to eliminate its retroactive feature and make it apply only from 30 days after its date, or December 5, 1927.

It seems clear that the provision of section 16a, authorizing the Commission upon rehearing to reverse, change, or modify the former order if it is in any respect unwarranted, permitted the amendment of the November '27 order that was made by the order of May 7, 1929. It may be noted in this connection that section 17 (1) authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business *and to the ends of justice.*"[*]

II

The order of November 5, 1927, was supported by substantial evidence introduced at the first hearing, clearly establishing that the Hoboken's division was unreasonably low, and, indeed so far below the actual cost of its service that, if prescribed, it would have been confiscatory

The evidence submitted by the Hoboken at the first hearing clearly showed that its division of 5¼ cents per 100 pounds was below the actual cost of the service rendered by it in making terminal de-

[*] Cf. *Interstate Commerce Commission* v. *Louis. & Nash. R. R.*, 227 U. S. 88, 92; *Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 126.

livery of the silk. As stated, its four items of expense are switching, policing, unloading and delivering, and terminal insurance. Comprehensive evidence submitted by witnesses for the Hoboken fully developed the necessity of these expenses, their reasonableness, and the method of calculating them.

The cost of switching the cars from the interchange track with the Erie, the placing of the cars on the Testing Company's sidetrack in a position to unload, and the return of the empty cars to the interchange was shown to be $14.93 per car, or 3.73 cents per 100 pounds on basis of 40,000 pounds per car. This was based upon careful estimates made by the Hoboken of switching costs on 12,565 cars handled during the year 1925, this being the total number of loaded cars of all traffic switched during that year. There was no claim by the Hoboken that the costs allocable strictly to switching were any higher on silk than on any other commodity, and for that reason showed its average switching cost on all traffic as its cost properly chargeable against the switching movement on silk.* (R. 72–73; 89–90, 91, 94–99, Ex. 2, R. 191.)

Because of the extraordinary value of [illegible]ommodity, four special armed guards are empl[illegible] by

*The method by which these costs were arrived at, and the supporting figures and details, were fully developed in the examination and cross-examination of Major O'Neal, in charge of the operations of the Hoboken. (R. 72–75, 86–90, 94–99.) See also testimony of Morgan W. O'Brien, Superintendent of the Hoboken. (R. 103–109.)

the Hoboken to protect the silk from theft while it is on its line, and these guards are paid $5 a day. (R. 75.) The total policing expense averages $5 per car, which reduced to a per 100-pound basis at 40,000 pounds per car equals 1¼ cents per 100 pounds. The Hoboken's insurance policy requires that it provide special police protection for this traffic. (R. 74.)

The duty is upon the Hoboken to unload these shipments from the car (R. 71, 72, 77, 87) and to make delivery to the consignees (R. 76), holding the property in a safe place until such delivery is made. The Hoboken notifies the consignees of the arrival of the shipments (R. 76), and thereafter the consignees have 48 hours free time in which to take delivery. (R. 76.) The tariffs of the Hoboken provide for the free-time period of 48 hours. (R. 174–175.)

The Hoboken holds the silk in the Testing Company's warehouse during the free-time period. (R. 76.) Under the arrangement with the Testing Company, the unloading of the silk from the cars is performed by labor of the Testing Company experienced in the handling, checking, and calculating of silk, under the joint supervision of the Hoboken and the Testing Company. If, upon the expiration of the 48-hour period, no delivery has been taken, the silk is turned into storage with the Testing Company, and thereupon it gives the Hoboken a regular standard warehouse receipt for it.

(R. 76.) The Hoboken's liability as a common carrier expires with the 48 hours free time. (R. 76.)

The normal manner of delivering less-than-carload shipments[1] is through the carrier's freight station. The Hoboken's local freight station is at the foot of 5th Street, but its facilities there are not adequate to take care of silk; it does not have the room, and the character of the building is not suitable for the storage of silk, or suitable for its protection against burglary, fire, theft, or damage. For this reason the Hoboken entered into the arrangement with the Testing Company under which that company acts as agent for the Hoboken in receiving, unloading, and delivering the silk.[2] (R. 76–78, 90–91, 93, 116, 121–131, 174–178.)

The Hoboken pays the Testing Company the actual cost of its services in unloading, storing in

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[1] The shipments, while transported in baggage cars, were not carload but less-than-carload shipments. (R. 71, 179.) The average weight of the lading of the cars, 40,000 pounds (R. 76), was the aggregate weight of a number of l. c. l. shipments transported in a single car.

[2] In the recent warehouse case, *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 513, this Court expressly upheld the right of a carrier to enter into such an arrangement where a forbidden discrimination is not effected, and in earlier cases, especially the *Arbuckle case*, *United States* v. *B. & O. R. R. Co.*, 231 U. S. 274, the right of railroad companies to contract with others to supply freight stations and to perform there the transportation services which the carriers are under a duty to perform, was expressly recognized.

The Testing Company's warehouse, under the arrangement, is expressly made the Hoboken's established delivery point for silk. (R. 77.) All silk shipments routed over the Hoboken as delivering carrier are turned over to the Testing Company as agent for the Hoboken, for delivery to the consignee. (R. 90–91; 118–119.) The Testing Company is in no case the consignee of the shipments. (R. 77.)

the warehouse during the free-time period, and making delivery to consignees. (R. 76; 90–91.) Actual cost figures covering the silk handled during four periods in August, September, and October, 1926, showed the actual cost to be $24 per car of 40,000 pounds, or 6 cents per 100 pounds. (R. 76, 121–128, 129, 130–131; Ex. 2, R. 191; Ex. 3, R. 192–197.)

The final and largest item of expense to the Hoboken is terminal insurance. As a common carrier, the Hoboken is of course liable for any loss, damage, or injury to the silk shipments while they are on its lines or in its possession. Owing to the very high value of the silk, the Hoboken has taken out an insurance policy in the amount of $1,100,000* covering its common carrier liability. (R. 73–75, 99; Ex. 8, R. 205–206.) Under the policy the insurance continues until the common carrier liability of the railroad ceases, which occurs when delivery is made to the consignee, provided that delivery is made within 48 hours after notice of arrival is sent to the consignee. Upon the expiration of the 48-hour period, when the common carrier liability of the railroad is reduced to that of warehouseman, the coverage ceases. The policy is of the general type known as a transit contract, i. e., a special form of full legal liability coverage and it includes fire, theft, burglary, and any loss that

*This would cover the value of only about four carloads of silk. The Hoboken was unable to obtain coverage beyond the $1,100,000. (R. 101.)

might occur for which the Hoboken would be liable. (R. 99–100.)

The premium is 1½ cents per $100 in value. Based upon a valuation of $7.50 per pound of silk, or $300,000 for a car of 40,000 pounds, the premium amounts to $45 per car, or 11¼ cents per 100 pounds. (R. 73–75, 101, 103.)

This is an expense particularly incurred by the Hoboken on silk shipments, no such expense being incurred on other classes or types of traffic. (R. 73–74.)

It is the practice of the transcontinental carriers to insure the silk while in transit (R. 101), but it was shown by the Hoboken that this insurance, taken out at the Pacific coast, does not fully protect the delivering carrier during the entire period that its common-carrier liability obtains (R. 82–83). It was admitted that the transcontinental insurance ends at the time the freight is taken out of the car (R. 173–174), whereas the common carrier liability of the Hoboken extends through the period of unloading from the car, through the free-time period of 48 hours, and until delivery to the consignee is effected[10] (R. 174–175). And it was shown that it is the practice of the Erie Railroad, as well as of the other lines, to take out re-insurance for the period of 48 hours free time when delivery is made on piers in New York (R. 167–168, 174), and that their re-insurance cost is the same as the

[10] *Southern Ry. Co. v. Prescott*, 240 U. S. 632.

Hoboken's, viz., $2.25 per ton, or 11¼ cents per 100 pounds (R. 82).

This and other evidence shows conclusively the necessity on the part of the Hoboken to insure the silk, and the evidence further indicates that the premium it pays is about as low as it can obtain. (R. 99–103.)

The Commission found, as a fact, that the Hoboken's terminal insurance is necessary:

> The value also increases the risk in handling and correspondingly increases the liability for loss. For protection against losses which may and do occur it is necessary to reinsure the value of the silk at a cost of 1.50 cents [illegible] each $100 in value, or approximately 11.25 cents per 100 pounds.
> * * *
> There can be no doubt of the increased risk in handling silk, and in the interest of efficient and economic operation the necessity for insurance and policing is obvious. (Report, R. 11, 12.)

In view of fluctuations in the value of silk, the Hoboken's cost of terminal insurance, based on value, may at times be more or less than 11¼ cents per 100 pounds. That figure is based on a value of $7.50 per pound. ($300,000 for a 40,000-pound car, R. 73, 103.) Testimony at the second hearing indicated extreme fluctuations from $4.80 to $17 a pound. (R. 251–254.) At $6 a pound the premium would be $36 for a 40,000-pound car, or 9

cents per 100 pounds. At the lowest value of $4.80 per pound the insurance expense would be 7.2 cents per 100 pounds. It appears, therefore, that in any event the cost to the Hoboken of the insurance alone exceeded the amount of its 5¼-cent division.

Defendants contended that the switching costs as given by complainant were of no probative value because the average cost was determined by using the entire length of complainant's line, whereas the silk traffic moves only about two city blocks. (See first report, R. 11.) Although the actual distance of the Hoboken's switch movement from the Erie interchange to the Testing Company's warehouse is very short, only about two city blocks (R. 71, 97), it was shown that the cost of that switch movement would be approximately the same as any switch movement over the Hoboken, the entire length of which is 1¼ miles (R. 97), and it was testified that the calculation was a fair one, the only difference between a short switch movement and a longer one being a few minutes difference in time, which would not substantially affect the costs (R. 94, 97.)[12]

[12] The bulk of the Hoboken's switching is in the vicinity of the silk plant. Only l. c. l. freight is handled in the Fifth Street freight house. The l. c. l. traffic is a relatively small portion of the whole. The Hoboken "handles cars from the steamship piers all up and down the waterfront," but "it really costs less to handle it a greater distance, because we can put 10 or 12 cars in a cup [cut] and move it, whereas the switching operations around the silk plants you can only handle 2 or 3 cars at a time. It really costs more, I believe, to handle the short haul than it does the longer haul, because in the longer haul you have got a greater number of cars in your train and the cost is less per car." (R. 97–98.)

As to the reasonableness of the unloading, storing, and delivering cost, it was shown, by undisputed testimony, that the other lines in making delivery at the New York pier stations, incur precisely the same cost, $1.20 per ton, or 6 cents per 100 pounds, based on a loading of 40,000 pounds per car. (R. 82.)

Defendants stated that the cost of policing is conjectural, speculative, and unjustified. The policing cost is based on the time spent by the four guards in protecting the silk during the period from the receipt of the cars on the interchange tracks with the Erie until the silk has been unloaded into the warehouse. (R. 74–75.) Defendants themselves employ special guards to protect the silk shipments in transit and at the destination terminals (R. 102, 158, 159, 167), and it was shown, without dispute, that the Hoboken's policing costs were no more than the actual terminal policing costs of the trunk-line defendants when they make delivery of silk shipments, i. e., 25 cents a ton, which equals 1¼ cents per 100 pounds, or $5 per car of 40,000 pounds (R. 82).

Thus the evidence showed clearly that the cost of the service the Hoboken necessarily performed and the expenses it necessarily incurred as the final or terminal carrier of these silk shipments aggregated about 22 cents per 100 pounds; and the evidence showed, as the Commission found, that

> The costs of handling silk *over that of handling other traffic* are shown by complainant

to be the cost of terminal insurance, policing, unloading, storing, and delivering.[13] (Report, R. 12.) (*Italics ours.*)

The evidence demonstrated the inadequacy of the ordinary less-than-carload freight division of 5¼ cents per 100 pounds when applied to silk, with its extraordinary value and risks;[14] and it would seem clear that the 5¼-cent division, if prescribed by the Commission, would have been confiscatory because so far below the cost of the service. (See *Nor. Pac. Ry.* v. *North Dakota*, 236 U. S. 585, 596; *New England Divisions Case*, 261 U. S. 184, 195; *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 285; *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 87.)

III

The evidence introduced at the first hearing sufficiently developed the matters to which the Commission is required to give due consideration by section 15 (6) of the Act, and supports the Commission's original order

Section 1 (4) of the Act places the duty upon carriers to establish just, reasonable, and equitable divisions of joint rates. Section 13 (1) authorizes any common carrier to file complaint with the Commission because of violation of any provision of the Act by any other common carrier. Section 15 (6) empowers the Commission to prescribe by order the just, reasonable, and equitable divisions of joint

[13] The cost allocated purely to switching was the same as on any other traffic. (R. 73; 86–99.)

[14] Cf. *Director General* v. *Viscose Co.*, 254 U. S. 498, 502.

rates to be received by the several carriers whenever, after full hearing, it is of the opinion that such divisions are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties to the joint rates. The last sentence of section 15 (6) provides:

> In so prescribing and determining the division of joint rates, fares and charges the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operation expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

The evidence introduced at the first hearing, which was before the Commission and received its consideration at the time it made its first order, covered the five matters referred to in section 15 (6) sufficiently to enable the Commission to give due consideration thereto. Evidence introduced at the first hearing in relation to those matters is here referred to.

1. Efficiency with which the carriers concerned are operated.

(a) The record established that the Hoboken's operation is efficient and economical.

The record of the first hearing as a whole contains much evidence bearing on the question of the efficiency of the Hoboken's operation. For instance, the Hoboken's superintendent, in response to a question whether the service given by the Hoboken on the silk traffic is as efficient as the other roads in the region, testified that the Hoboken had been highly commended by the other roads on the way it had handled the cars after they arrived on its road by promptly placing them on the siding for unloading, so as to complete the movement to destination in quick time. (R. 107.) The element of time in the handling of silk, it was testified, is very important. (R. 107.) Indeed, the efficiency of the carriers in handling this silk traffic would seem to be gauged largely by the speed with which they perform the transportation. The enormous value of the commodity requires prompt transportation, for interest alone on the value of a car of silk worth $250,000 amounts to over $40 a day. Safety in transportation is also obviously important.

The Hoboken, in order to reduce its liability by promptly getting the silk under the protection of the Testing Company's warehouse (R. 127), drops other work (R. 105), clears a track (R. 92), and immediately switches the cars to the unloading platform (R. 105).

The policing and insurance protection of the Hoboken also reflect efficient and economic operation. In its report the Commission mentioned the necessity for insurance and policing by the Hoboken "in the interest of efficient and economic operation."

(b) The arrangement under which the Hoboken employs the Testing Company to unload, store, and deliver to consignees was shown to be economically sound and in the interest of a safe and efficient operation.

The defendants contended that there is no obligation on the Hoboken to employ the Testing Company to unload, store, and deliver the silk to consignees, and that the arrangement is economically unsound. (See first report, R. 12.) But the evidence shows directly to the contrary. It was expressly testified that the Testing Company's warehouse "is selected by us because of the safety and economy of operation by the railroad company." (R. 77.) The Hoboken is using that warehouse as its unloading, storing, and delivering point instead of its local freight house. (R. 77.) This is done, as was directly testified, "because it is more economical and convenient to us. It is a better storage, a better safeguard for this commodity."[11] (R. 78.)

[11] The Hoboken did not get the Testing Company to locate on its rails. Major O'Neal testified (R. 90): "After they had located there, that is, after they had made all of their arrangements and purchased the property, and had been discussing railway service with somebody else than me, then they came to me and we found that we had to do something. They had a very large investment there and they were going to give us freight traffic. So we took a good many months to figure around just what was the best arrangement to make. We realized that our own facilities were entirely inadequate to take care of this valuable commodity, to properly safeguard it, but that

It was testified, further, that the charge made by the Testing Company for the unloading and delivering is reasonable and that "the facility that is there offered is convenient for an efficient operation." (R. 85.)

Defendants further contended that the Hoboken "should unload and store the silk in its warehouse with other less-than-carload freight, and if that would not be practicable then to leave it in the cars under transcontinental insurance until delivery to consignees or else deliver it to the Testing Company as agent of the consignees, thus relieving itself of all liability." (See original report, R. 12.) But apparently the Hoboken can not follow the latter alternative. The Testing Company is not the agent for the silk shipper or receiver (R. 117), and is in no case the consignee (R. 77, 116), nor is any of the silk consigned in care of that company (R. 118). The bills of lading, which are usually "order-notify," specify Hoboken Manufacturers' R. R. delivery, and all shipments of silk received by the Hoboken, irrespective of whom they are consigned to, are turned over to the Testing Company, as the Hoboken's agent, for delivery to the

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the facilities they were providing were quite ample and could be made to meet our own need as well as their own. So we proceeded to make an arrangement with them whereby we used a portion of their warehouse for the storing of the silk so long as it belonged to us for the forty-eight hours, and an arrangement whereby they would with their own labor perform the unloading under the joint supervision of our company and their company, *and they were to make us a charge as to the actual cost of the service and no more, actual cost of unloading it, storing and delivering to the consignee.*" (R. 90–91.)

consignee.[16] (R. 118–119.) The facilities of the Testing Company are utilized by the Hoboken as its established place of delivery, in lieu of its freight station, which is unsafe and inadequate for the common-carrier duties of the Hoboken in the storage and delivery of this extraordinary article. (R. 77–78, 119.) Respecting the suggestion that delivery be made to the consignees from the cars, no evidence was submitted by the defendants to contradict the testimony that the arrangement with the Testing Company is convenient, economical, and efficient, or to show that, contrary to the universal practice of making delivery of less-than-carload shipments from the carrier's warehouse, it would be practicable, safe, convenient, or economical to attempt to deliver such shipments from freight cars.

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[16] The Testing Company gives the Hoboken a receipt for the silk immediately upon unloading it from the cars. "We have a check sheet and a receipt immediately upon the car being unloaded. They sign our check sheet and then if the freight remains in storage after 48 hours they give us a warehouse receipt." (R. 91.) As to whether the Hoboken or the Testing Company is liable for this silk after it is unloaded and after the Testing Company has given its receipt to the Hoboken, the Hoboken can not shift the common carrier liability that rests upon it for the period of 48 hours. The shipper, of course, would look to the railroad, but as between the railroad and the Testing Company, the latter is liable to the Hoboken. (R. 91.)

The Testing Company does not make a test of the silk on delivery, it does so only upon request of the consignee. The carrier does not authorize any testing. (R. 93.)

Further details regarding the activities of the Testing Company and of the service it performs for the Hoboken, is given in the testimony of Witness Daniel E. Douty, Vice President and General Manager of the Testing Company (R. 109–121), and of Witness Everard C. Brown, in immediate charge of the Testing Company's warehouse, shipping, and billing departments (R. 121–182), and compare testimony of defendants' witness H. Wilson. (R. 168–187.)

Finally, it may be noted that the present arrangement under which silk shipments are delivered by the Hoboken, and in turn through the agency of the Testing Company, is one in the interest of efficient and economic handling, resulting in a saving to the silk industry and to carriers, the elimination of wasteful transportation, and the unnecessary, duplicated expense of lightering the silk across New York Harbor and back again to the Jersey side, where most of the silk mills are located. (See R. 78–79; 113–116.)

(4) The record indicated that the silk traffic is efficiently handled by the transcontinental carriers.

Gauged by the speed and safety with which they perform the transportation, it would seem that the handling of the silk traffic by the transcontinental carriers is efficient. The shipments are transported east in solid trainload lots. (R. 115–116.) This is made possible by the fact that the consignees do not specify the transcontinental route over which the shipments shall move[17] (R. 15), the routing being left open so that all of the silk arriving in any one ship may be gathered into trainload lots and routed by one road. (R. 115.) The distribution to the initial carriers at the Pacific ports of import is left to the steamship lines and to the rail carriers. (R. 115.)

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[17] The Hoboken is, however, specified as the delivering carrier. (R. 118–119.) The shipments are consigned to a named consignee (R. 77, 113), destination Hoboken, N. J., "Hobpken Manufacturers' R. R. delivery" (R. 118–119).

The movement across the continent is expedited and great speed is attained, up to a maximum of 100 miles per hour (R. 102), the run usually being completed in 3½ days (R. 102, 136). Baggage cars, which are passenger rather than freight cars, are usually employed for this service. (R. 107.)

Armed guards travel with the trains across the country (R. 102) for the protection of the silk against banditry, four patrolmen usually being assigned to the train (R. 159, 167).

In addition to the police protection, insurance is taken out covering the risk in transit, the premium paid by the transcontinental carriers being 4 cents per $100 for the trip. (R. 102.)

Due to the good police protection and other protection thrown around the silk by the carriers, the loss and damage claims are very small. (R. 172, 179.)

The evidence before the Commission relating to the efficiency with which the carriers concerned are operated had particular reference to the transcontinental silk traffic, since the sole issue was the reasonableness of the Hoboken's division of the one rate, $9 per 100 pounds, applying on silk alone. The Hoboken's petition to the Commission did not ask for an increase in its divisions on all traffic on the ground that it was in need of additional aggregate revenue, but was predicated upon the fact that the division on import silk was below the cost of its service. Therefore, the case at bar is to be distinguished from cases like the *New England* and

Orient divisions cases, where the divisions of the rates on all traffic were in issue and in which the court held that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road, and that it may be given a division larger than justice merely as between the parties would suggest, in order to maintain it in effective operation as part of an adequate transportation system, *provided the share left to its connections is adequate to avoid a confiscatory result.* In such cases there must be full evidence as to the efficiency with which the carriers concerned are operated, to be considered in connection with evidence as to the amount of revenue required to pay their respective operating expenses, taxes, and a fair return, to the end that the financial needs of one carrier may not be satisfied at the expense of another carrier also needy. But where the evidence discloses, as in the case at bar, that the division accorded by a large group of trunk-line carriers to a short delivering carrier out of a single joint rate on one commodity only is *below the cost of the service* economically and efficiently rendered by the short carrier and hence not adequate to avoid a confiscatory result, evidence as to the general efficiency of the trunk-line carriers seems irrelevant because in no event could they be relieved of the obligation to accord the short line, out of a rate voluntarily established and maintained by them and therefore presumably high enough to be profitable, a division commensurate

with the cost of the short line's service, on the ground that they, though efficiently operated, are in need of additional revenue. No such need could be satisfied through a division to the short line inadequate to cover that line's actual expenses of handling the commodity.

2. The amount of revenue required to pay the respective operating expenses of the carriers concerned, taxes, and a fair return on their railway property.

The 12 western carriers, defendant in the Commission proceeding, included such large systems as the Santa Fe, the Milwaukee, the Northwestern, the Rock Island, the Northern Pacific, Great Northern, Burlington, Union Pacific, Southern Pacific, Western Pacific, Missouri Pacific, and Illinois Central. These great transportation systems are unquestionably representative carriers in the Western District. Among the 24 eastern defendant carriers were the New York Central, the Pennsylvania, the Baltimore & Ohio, the Nickel Plate, the Erie, the Wabash, and other large systems forming the backbone of the Eastern District.

The net railway operating income of the carriers in the Eastern District and the Western District, and in the several regions in those districts, the operating income and the rate of return on the property investments were shown. (Exhibits 4 and 5, R. 199–201.) These figures were introduced at the first hearing, November 22, 1926, and covered the first eight months of that year and com-

pared the figures for that period with the corresponding period in 1925. For the 1926 period, Eastern District, the net railway operating income was $389,093,089 and the rate of return 5.69%, whereas for the Western District, 1926, the net railway operating income was $250,368,023, rate of return 4.28.

This evidence was put in by the western carriers (R. 132–146), who asked that any increase granted in the Hoboken's division be deducted from the primary division of the eastern lines (R. 133–135; 140–146).

(a) Delivery of the silk traffic by the Hoboken saves the trunk-line carriers terminal expenses of 31 cents per 100 pounds which they formerly incurred in making delivery at New York pier stations. Hence, the increased division to the Hoboken of 22 cents per 100 pounds does not adversely affect the net revenues of the other carriers.

The revenue under the $9.00 rate, at a per car weight of 40,000 pounds, is $3,600 per car. Under the divisions in effect at the time of the Hoboken's complaint, the revenue accruing to the western lines was $2,610 per car (72½%); to the eastern trunk lines, $969 per car (27%); and to the Hoboken $21 per car (½%). Under the Hoboken's increased division of 22 cents per 100 pounds, the revenue accruing to the western lines is the same as before (72½%); to the eastern trunk lines $902 per car (25.05%); and to the Hoboken, $88 per car (2.45%). In other words, the eastern lines' revenue is reduced

$67 per car and the Hoboken's revenue is increased in the same amount. Tabulated, these figures are as follows:

	Old division		Prescribed division	
	Per 100 pounds	Percentage	Per 100 pounds	Percentage
Western lines	$0.6360	72½	$0.636	72.50
Eastern trunk lines	.2425	27	.245	25.05
Hoboken	.0035	½	.220	.45
	.8820	100	.900	100.00

Revenue per car basis:

	Old division per car	Prescribed division per car
Western lines	$2.610	$2.610
Eastern trunk lines	909	902
Hoboken	21	88
	3.600	[illegible]

The eastern lines made no contention whatever that an increase in the Hoboken's division would unduly shrink their division or adversely affect their revenues.

But evidence adduced by the western carriers and by the Hoboken demonstrated that the revenues of the eastern carriers would not be adversely affected by an increase in the Hoboken's division to 22 cents. This evidence established two ultimate facts, first, that the primary division of the eastern lines to New York, Philadelphia, Baltimore, and Washington and a narrow strip between those points taking in the large Atlantic Coast terminals,

were increased from 25 to 27½ per cent, effective May 1, 1922. (R. 135, 137.) One reason for granting this increased division was the "terminal costs at the Atlantic Seaboard" (R. 137); second, prior to the Testing Company's removal of its warehouses and laboratory from the Manhattan to the Jersey side, the cost to the Erie Railroad and the other trunk-line defendants, whose rails end on the Jersey side (this being true of all those carriers except the New York Central, R. 81), of effecting terminal delivery was 31 cents per 100 pounds (R. 79–82). This cost was shown by undisputed testimony, and it included the heavy expense of floating the silk across New York Harbor (R. 79–82; 165) and other costs similar to those now borne by the Hoboken, including reinsurance, policing, unloading, and delivering (R. 82, 160, 162, 167, 174). When the Testing Company was located in Manhattan delivery to the consignees was made at the carrier's pier stations in New York. (R. 79, 119, 160, 162.) The silk had to be thereafter drayed from the pier to the Testing Company's plant (R. 113, 119), but the cost of 31 cents included nothing for such drayage. Tabulated, the costs for making pier delivery on the New York side were as follows:

	Per ton	Per car	Per 100 pounds
			Cents
Floating	$2.60	$80.00	12.60
Unloading and delivering	1.30	24.00	6.00
Insurance	2.25	45.00	11.25
Policing	.35	6.00	1.35
Total	6.50	134.00	31.00

After the removal of the Testing Company to its present location on the rails of the Hoboken, the west-side carriers were relieved of this expense and in lieu thereof, under the Commission's order, they are required to pay the Hoboken only 22 cents. Thus the increased division to the Hoboken can not reduce the earnings of the eastern lines, but instead will have the effect of increasing them to the extent of 9 cents per 100 pounds, equaling $36 per car of 40,000 pounds.

The increase in the eastern lines' primary division from 25 to 27½ per cent increased their revenue $90.00 per car. As shown, the revenue under the $9.00 rate, based on 40,000 pounds per car, is $3,600 per car. Under the former primary divisions of 75 and 25 per cent, respectively, the revenue of the western lines was $2,700 per car and of the eastern lines $900 per car, whereas, under the changed divisions of 72.5 and 27.5 per cent, respectively, the revenue of the western lines is $2,610 per car, a decrease of $90 per car, and of the eastern lines $990 per car, an increase of $90 per car. The increased subdivision of 22 cents per 100 pounds to the Hoboken aggregates $88 per car. It is obvious that the increase in the primary division granted by the western lines to the eastern lines because of heavy terminal expenses at the Atlantic Seaboard alone more than covers the entire reasonable division prescribed for the Hoboken, and when the saving of 9 cents per 100 pounds effected through making terminal delivery on the Hoboken rather than

on the Manhattan side is taken into consideration, it is evident that the revenues of the eastern trunk lines are bettered.

Witness Toll, agent of the Trans-Continental Freight Bureau, testifying in behalf of western carriers (R. 132–133), adverted to the saving to the eastern line-haul carriers by the use of the facilities of the Hoboken for delivery, and called attention to the fact that under the divisional arrangements between the western and eastern lines any such saving accrues entirely to the eastern lines. (R. 135.) For that reason, he urged that any increase in the Hoboken's division should be absorbed by the eastern lines, for otherwise the anomalous situation would be brought about "where all of the economies would accrue to the lines east of Chicago" and yet the western lines would pay a portion of the increase in the Hoboken's division. (R. 135; see also R. 138–146.)

The same witness, after pointing out that "the rate of return for the central eastern region was 4.86 per cent in 1925 and 5.24 per cent in 1926, whereas the rate of return to the western district (as a whole) was 3.63 per cent in 1925 and 4.28 per cent in 1926," made the following statement:

> If, in reaching a conclusion in this matter the Commission should be actuated by the needs of the complainant carrier as was the case in the New England Divisions Decision, then we respectfully submit that the eastern

lines' earnings are and have been for a considerable period, greater than those of the western lines and come nearer to approximating the rate of return contemplated by Congress. (R. 136, 137.)

But it is evident from the Commission's first report that in reaching its conclusion the Commission was not actuated by the needs of the complainant carrier other than its indisputable need for revenue in the form of a division on the silk traffic that would at least cover the cost of the service it rendered.

(b) Evidence conclusively establishing that the Hoboken's division on silk was far below the cost of its service demonstrated its need for additional revenue from this traffic.

At the first hearing the Hoboken made no claim, and submitted no evidence to show, that it was in a weak financial condition, although its evidence upon rehearing showed this to be a fact. For it based its case originally upon the fact that its division of 5¼ cents, applicable to ordinary less-than-carload freight, was wholly inadequate when applied to the silk traffic with its extraordinarily high terminal expenses, and far below the actual cost of the service. It would seem that in these circumstances it was not necessary that the Hoboken should submit evidence of its general financial condition, for whether it were strong or weak, it could not be compelled to handle the traffic at a loss or

at any compensation less than its reasonable cost of service. It is settled that a carrier may not be required to maintain a rate on a particular commodity that is below the cost of the service rendered in transporting that commodity, on the ground that it is able to earn a profit on all of its business. *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585; *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 549; *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 480, 481, 482, and cases cited. The same rule of law applies to divisions of joint rates, for the share or proportion of the joint rate which a particular participating carrier receives is in fact that carrier's rate, in so far as its earnings are concerned.

Evidence that the Hoboken's division was lower than the cost of the service efficiently and economically performed by it established indisputably its need for additional revenue upon this traffic and enabled the Commission to give due consideration to its revenue requirements.

3. Importance to the public of the transportation services of carriers concerned.

It was testified that the Hoboken Manufacturers' Railroad is an essential factor in the commerce and industry of Hoboken. (R. 132.) "It is the only rail service maintaining direct connection with the piers of 12 ocean-going steamships, the Federal Terminal Buildings which house several nationally known industries, and the two largest warehouse develop-

ments in the city. This railroad occupies a strategic position along practically the entire water front of Hoboken and industries locating on this water front in the future will be dependent upon the continued operation of the Hoboken Manufacturers' Railroad." (R. 132.) The importance to the public of the transportation services of the great transcontinental railroad systems is apparent from the record as a whole and is probably a matter of which judicial notice may be taken. (See especially Exhibits Nos. 4 and 5, R. 199, 201.)

4. Whether any particular participating carrier is an originating, intermediate, or delivering line.

The testimony shows that the Hoboken is the delivering line of the shipments of silk in question (R. 71) and that the other lines in the route are originating or intermediate lines (R. 133–137; 138–146).

5. Any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate.

Facts already stated, indicating clearly that the Hoboken, as the delivering carrier, is subjected to many unusual expenses in making terminal delivery of the highly valuable commodity involved, in addition to the cost of its haul, established that the Hoboken is entitled to a division of the joint rate on silk larger than one measured solely by its mileage haul.

CONCLUSION

It is respectfully submitted that the decree of the court below should be reversed with directions to dismiss the petition for want of equity.

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OCTOBER, 1931.

APPENDIX

The Interstate Commerce Act provides:

SECTION 1(4). *Duty to furnish transportation and establish through routes; division of joint rates.*—It shall be the duty of every common carrier subject to this Act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Act participating therein which shall not unduly prefer or prejudice any of such participating carriers.

SEC. 13(1). *Complaint to Commission of violation of law by carrier; reparation, investigation.*—That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act, in contravention of the provisions thereof,

may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15(2). *Orders of Commission.*—Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

SEC. 15(6). *Commission to establish just divisions of joint rates, fares, or charges; adjustments.*—Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or

property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

SEC. 16(6). *Suspension or modification of orders.*—The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

SEC. 16a. *Rehearings by Commission; stay; decisions.*—That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

SEC. 17(1). *Conduct of proceedings, etc.*—That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

In the

Supreme Court of the United States

October Term, 1931

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY,

Appellants,

against

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Appellees.

BRIEF ON BEHALF OF THE HOBOKEN MANUFACTURERS' RAILROAD COMPANY, *Appellant.*

Parker McCollester,
Attorney for Appellant,
Hoboken Manufacturers' Railroad Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 33.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY,

Appellants,

against

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF ON BEHALF OF THE HOBOKEN MANUFACTURERS' RAILROAD COMPANY, *APPELLANT.*

Reference to the Official Report of the Opinion in the Court Below.

The opinion of the District Court is reported in *Baltimore & O. R. Co., et al.*, v. *United States of America*, 43 Fed. (2d) 603.

The decisions of the Interstate Commerce Commission which are involved are reported in 132 I. C. C. 579 and 155 I. C. C. 330.

The Grounds on Which the Jurisdiction of this Court is Invoked.

A joint brief was filed by all of the appellants in accordance with paragraph 1 of Rule 12, stating the grounds of jurisdiction.

The decree of the District Court was entered December 19, 1930 (R. 44). The petition for appeal was filed and the appeal was allowed on February 16, 1931 (R. 47, 48).

The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. L. 208, 219, 220, (U. S. C. Supplement III, Title 28, Sec. 47a); and subsection 4, Sec. 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. L. 936, 938, (U. S. C. Title 28, Sec. 345).

Statement of the Case.

This is a suit to enjoin the enforcement of two orders of the Interstate Commerce Commission dated respectively November 5, 1927 (R. 9-13) and May 7, 1929 (R. 14-23), determining and prescribing the reasonable division to be received by the Hoboken Manufacturers' Railroad (hereafter called the "Hoboken") out of a joint through freight rate of $9.00 per 100 pounds provided for shipments of raw silk from Pacific Coast points to New York Harbor destinations. The case was heard by a statutory three-judge court, which entered a final decree enjoining and annulling both of these orders (R. 44). From the judgment of the court below this appeal has been taken.

History of the Proceeding.

The Hoboken is a short terminal or switching railroad operating along the Hoboken waterfront of New York Har-

bor. It has direct rail connection with the Erie Railroad and interchanges freight with other railroads reaching New York Habor (hereafter with the Erie referred to as the Trunk Lines) either through the Erie or by car float (R. 10).

Raw silk imported from the Orient is transported from the Pacific Coast ports to New York Harbor by the various transcontinental railroads (R. 7, 114, 115). Prior to 1926 the silk was delivered at laboratories of the United States Testing Company then located in Manhattan (R. 112). The deliveries were made by the Trunk Lines, the appellees here, at an expense for their terminal services estimated at 31 cents per 100 pounds (R. 82). In 1926 the Testing Company, which tests silk for the silk industry and maintains a textile warehouse (R. 110), moved its plant to a newly-constructed warehouse and laboratory located on the lines of the Hoboken Manufacturers' Railroad in the City of Hoboken (R. 112). To make delivery of silk to this warehouse it was necessary to employ the Hoboken as a terminal or switching carrier (R. 70, 71, 112).

The handling of this silk imposed upon the Hoboken the obligation of performing operations and arranging for new and special facilities with additional expenses not involved in the handling of ordinary freight (R. 73, 74). Since the shipments were less-than-carload shipments, it was the carrier's obligation to unload the silk from the cars and to make delivery through a freight house (R. 71, 72). It was, therefore, necessary for the Hoboken to provide a freight house suitable for the storage of silk prior to delivery and to provide men to unload the silk who were experienced in handling this commodity. Its own freight house not being suitable for the purpose (R. 78), the

Hoboken entered into an arrangement with the Testing Company to provide the necessary space in its new warehouse, to act as the Hoboken's agent to unload the cars with its skilled employees, and to hold the silk until delivery, paying it its actual costs for these services (R. 76, 90). Because of the great value of silk it was also necessary for the Hoboken to provide special guards to protect the cars containing the silk prior to and during the unloading (R. 74, 75); to cover its risk by special insurance (R. 74) and to drop all other work in order to switch these cars promptly when they were delivered to it (R. 105).

By the transfer of the delivery service to the Hoboken the Trunk Lines were thereby relieved of their terminal obligations in connection with the handling of silk, including the necessity of transporting the cars containing the silk across New York Harbor on car floats, and unloading the silk from the cars (R. 78, 79, 117, 120, 154, 160, 167, 168).

As the Commission subsequently found on the evidence produced before it, due to the unusual expenses incident to the handling of silk, the cost to the Hoboken of the terminal service imposed upon it for these silk shipments amounted to 22.23 cents per 100 pounds (R. 11, 18). This figure was made up as follows (R. 191):

	Per Car	Per 100 lbs.
Switching	$14.93	$.0373
Terminal Insurance	45.00	.1125
Policing	5.00	.0125
Unloading and Delivering	24.00	.0600
Total	$88.93	$.2223

Notwithstanding this cost, regardless of the extraordinary character of the freight, and in spite of the fact that the Trunk Lines were, themselves, relieved of a terminal service which had cost them approximately 31 cents per 100 pounds, they declined to allow the Hoboken as its division out of the joint through rate of $9.00 any greater division than that allowed to it from the rates on ordinary less than carload* freight, namely 5¼ cents per 100 pounds (R. 10).

Accordingly, on August 6, 1926, the Hoboken filed its complaint with the Interstate Commerce Commission, under Section 13 of the Interstate Commerce Act, alleging that the division of 5¼ cents per 100 pounds allowed to it out of the joint through rate of $9.00 per 100 pounds on silk was and for the future would be unjust and unreasonable, in violation of Paragraph 4 of Section 1 of the Interstate Commerce Act, and asking an increased division (R. 60). All of the railroads participating in the transportation of the silk from the Pacific Coast ports to New York Harbor were made defendants (R. 55, 56).

At the time this complaint was filed the stock of the Hoboken was owned by the United States (R. 69). Subsequently the stock was sold to private parties (R. 243) and the litigation was continued by the Hoboken under its new owners.

A hearing was held on November 22, 1926, and the evidence taken at this hearing, consisting of 161 typewritten pages of testimony and 8 exhibits, was offered in evidence as an exhibit in the court below and is part of the record here (R. 63-206). This evidence disclosed the above facts and others which will be summarized presently.

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*The silk shipments were less-than-carload shipments (R. 71, 72).

Briefs were filed by all parties, there was a proposed report by the Examiner who heard the case, and oral argument was had (R. 207).

On November 5, 1927, the Commission, by its Division 1, entered its report and order (132 I. C. C. 579). In its report the Commission found that the division received by the Hoboken was, and for the future would be, unjust and unreasonable, in violation of Section 1 (4) of the Act, and that a reasonable division for the future would be not less than 22 cents per 100 pounds (R. 207-211). The Commission also found that the division allowed to the Hoboken had been unreasonable to the extent that it was less than 22 cents on shipments handled by it since August 6, 1926, the date of the filing of the Hoboken complaint (R. 211). On the basis of this report, Division 1 of the Commission issued its first order directing that

> "said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic" (R. 212, 213).

The Commission also provided by another paragraph of its order

> "That this order take effect as of August 6, 1926, and shall continue in force until the further order of the Commission". (R. 213.)

Subsequently, this Court announced its decision in *Brimstone R. R. Co.* v. *United States,* 276 U. S. 104, holding that Section 15 (6) of the Interstate Commerce Act did not empower the Commission to require a readjustment of divisions dating back to the time of the filing of the original complaint, except when the rate or rates divided had been

specifically prescribed by it. The $9.00 rate had not been so prescribed and the retroactive feature of its first order was therefore invalid. Accordingly, by an order dated May 14, 1928, the Commission on its own motion reopened the proceeding for further hearing (R. 214).

Such further hearing was had, additional evidence was presented, comprising 79 pages of testimony and 22 exhibits, and various stipulations were made (R. 215-340). Further briefs were filed, there was another Examiner's report and oral argument was had before the entire Commission. Thereafter, on May 7, 1929, the Commission entered its report on rehearing affirming the original finding made by it that the Hoboken was entitled to a division of not less than 22 cents per 100 pounds (R. 341-353) (155 I. C. C. 330). With respect to its first order, the Commission, referring to this Court's decision in the *Brimstone* case, said:

> "The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the act. By paragraph 2 of Section 15 of the act 'all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order.' An order prescribing a division for the future is not an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927.
>
> Defendants take the position that the facts to which we are required to give consideration under Section 15 (6) of the act were not present in the original

record; that, therefore, the original order herein was null and void; and that any order herein must speak from the date of a final decision upon the entire record. We do not agree with this contention. The former finding as to the future division is amply supported by the evidence upon the original record." (R. 350-351.)

The Commission accordingly entered its second order, dated May 7, 1929, directing:

> "That the said order of November 5, 1927, be and it is hereby modified to read as follows:
>
> *It is ordered,* That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways." (R. 355.)

The appellees and their connections still refused to increase the Hoboken's division in compliance with the Commission's findings and orders, and the Hoboken was subsequently informed that they intended to contest the validity of both orders. To compel compliance with the Commission's determination as to future shipments; to avoid, as applied to such shipments, the questions raised by appellants with respect to the validity of the Commission's first and second orders; and to secure payment without delay of the increased division on such shipments as might move during the pendency of the contemplated litigation, the Hoboken on January 7, 1930, filed with the Commission a motion for a further order which should direct the pay-

ment of the increased division on future shipments but should be in such form as not to be subject to the objections urged against the earlier orders, leaving the prior orders undisturbed, however, as applied to the transactions which they had been intended to cover (R. 356-361). On February 4, 1930, the Commission entered a third order directing that the Hoboken should receive a division of not less than 22 cents on all shipments handled by it on and after March 10, 1930, but directing that its two previous orders should not be considered as modified, amended or rescinded as applied to any shipments transported prior thereto (R. 364-366).

Although the petition in this suit, as filed, attacked the third order as well as the first two, the third order is not now involved in this litigation, the appellees having accepted it (R. 44) and the court having issued its injunction against the enforcement of the first two orders only and having denied an injunction as to the third order (R. 45).

The grounds on which it was alleged in the petition that the first two orders should be annulled may be summarized as follows: first, that the order of November 5, 1927 was invalid because not supported by sufficient evidence and because the Commission failed to comply with the requirements of Section 15 (6) by failing to give due consideration to the factors there specified (Paragraphs 13, 14, 15 of Petition; R. 6, 7); second, that this order was null and void because the Commission attempted to make it applicable to shipments prior to the date of the order and moving on and after the date of the filing of the Hoboken's complaint with the Commission (Paragraphs 7, 8, 9, 10; R. 5); third, that the order of May 7, 1929 was invalid as a retroactive order (Paragraphs 7, 8, 9, 11; R. 5, 6); and fourth, that both of the or-

ders were invalid because they were not limited in their application to transportation moving entirely within the United States, but were applicable also to transportation through Canada (Paragraphs 16, 17; R. 7).

The fourth allegation will not be further discussed in this brief. It was stated by the answer of the Interstate Commerce Commission to the petition that the Commission's order was limited to the prescription of divisions of rates subject to its jurisdiction; that the Commission did not interpret the Act as conferring upon it jurisdiction to prescribe divisions of international joint rates; and that its orders were not intended to prescribe divisions of any joint international rate applicable to transportation conducted partly through Canada (R. 36-37). The answer was accepted by the court below and by the parties as an interpretation and limitation of the Commission's order, and therefore the fourth contention was not further urged.

The court below held that both the first and second orders were null and void and issued its final decree enjoining and setting them aside.

It was the conclusion of the court that the evidence before the Commission as a result of the first hearing, which preceded its decision and order of November 5, 1927, was not sufficient to enable the Commission to meet the requirements of Section 15 (6) of the Interstate Commerce Act and that the order was based principally upon the Hoboken's claim of its need for added revenue without consideration of the revenue needs, efficiency of operation, etc., of the Trunk Lines and transcontinental railroads. On these grounds, as well as on the ground that it was retroactive in effect, the court held that the first order was null and void. No contention was made that the evidence before the Commission as a result of the re-

hearing was insufficient, and it was apparently the opinion of the court below that the evidence before the Commission when it made its second order fully met the requirements of the Act (R. 43). The court, however, having determined that the first order was void, held that the second order was null and void in its entirety as a retroactive order because it attempted to relate back to and correct the first order.

Questions Presented.

On these facts, the questions to be determined are:

1. Did the court below err in concluding that the evidence before the Commission on the first hearing was insufficient and that the Commission failed to comply with the provisions of Section 15 (6) of the Interstate Commerce Act.

2. Did the court below err in enjoining the Commission's first order (November 5, 1927) in so far as it applied to and determined the future just and reasonable division to be received by the Hoboken because the Commission at the same time attempted to require a retroactive readjustment of divisions.

3. Did the court below err in enjoining in its entirety the second order of the Commission (May 7, 1929) because by that order the Commission undertook to amend or correct the form of its first order.

The Evidence on the First Hearing Before the Commission.

The facts already stated (*supra*, pp. 2 to 5) were developed by the evidence at the first hearing. This evidence may be further summarized as follows:

Value of Silk.

Forty thousand pounds of silk on the average were loaded in a car (R. 82) and the value of this silk was approximately $300,000 (R. 103).

The Freight Rate on Silk.

A rating of one and one-half times first class is provided in the carriers' tariffs for silk handled in ordinary freight train service. For this imported silk, however, when handled in special trains approximating passenger train time, a much higher rate of $9 per 100 pounds is published from the Pacific Coast ports to New York (R. 135, 136).

Operations of the Transcontinental and Trunk Lines in Handling Silk.

The silk is imported through Pacific Coast ports. The routing of the silk is left largely to the steamship companies (R. 115). It is brought across the continent in trainloads (R. 116), which because of the value of the silk, are transported at very high speeds approximating passenger train time (R. 102, 113, 136). The transcontinental lines provide heavily armed guards for these trains (R. 102) and protect themselves by insurance (R. 102, 173). The Erie Railroad, for example, provides about one watchman to a car. When the cars reach Jersey City, the Erie provides a special movement in order to deliver them to the Hoboken and get rid of the silk as quickly as possible (R. 158).

The Switching Operations Performed by the Hoboken, on Silk Shipments.

Because of its great value and the risk involved in handling silk, the Hoboken drops its other operations when a car of silk is delivered to it in order to switch the car at once and place it for unloading (R. 74, 75, 105). It is necessary to keep a track open for the purpose in order to accomplish fast, prompt delivery (R. 85). The cars containing the silk are switched to the plant of the Testing Company where the silk is unloaded, and the empty cars are then returned to the Erie (R. 71).

The operations involved in the interchange of silk between the Erie Railroad and the Hoboken and the switching operations of the Hoboken in handling silk were described in detail and were compared with the operations involved in the handling of other freight (R. 71, 74, 75, 86, 87, 88, 92, 97, 98, 104-108, 157-165).

Guards Furnished by Hoboken.

The Hoboken places guards around the cars, four men usually being assigned to protect the silk (R. 74). The expense of this policing is not incurred on other classes of freight (R. 74).

Unloading, Storage and Delivery of Silk by the Hoboken Through the Agency of the Testing Company.

The rate charged on the silk is an any-quantity rate (R. 77) and the shipments are less-than-carload shipments, so that it is the Hoboken's obligation under the tariffs to unload the silk from the cars, store it during the period of free time, and make delivery to consignees through a freight house (R. 71, 72).

The Hoboken's own freight house, located at 5th Street, Hoboken, is not suitable for the handling and protection of silk (R. 78). Because of the inadequacy of its own facilities, the Hoboken has made arrangements with the Testing Company to act as its agent to unload the shipments with its employees, skilled in the handling of silk, to provide storage space in its warehouse for the silk during the period of free time, and to make delivery of the silk as the Hoboken's agent (R. 76, 90). The Hoboken remains liable for the silk as a common carrier during the period of forty-eight hours free time (R. 91).

Insurance Carried by the Hoboken on Silk.

The insurance carried by the transcontinental and Trunk Lines expires when the silk is unloaded from the cars (R. 173). Because of the high value of the silk and the risk of handling it, it was therefore necessary for the Hoboken to protect itself by special insurance covering the period that the silk is in its possession as a common carrier. The expense of this insurance is an expense not incurred in connection with the handling of other freight (R. 73, 74).

The Cost to the Hoboken of Handling Silk and Amount Required to Pay Its Operating Expenses, Taxes, Etc.

As already stated, the cost to the Hoboken for switching, insurance, policing and unloading and delivering was shown to be $88.93 per car or 22.23 cents per 100 pounds (R. 72, 191). These figures represent only actual costs and include nothing for profit or return on investment. It was testified in great detail how these various items of cost were made up (R. 72-76, 88-90). It was testified that the

totals from which these figures were computed included taxes of $45,806, rentals of $30,908, maintenance of way and structures $25,875, and other items, the figures for which were given (R. 89, 90).

THE EXPENSE TO THE TRUNK LINES OF MAKING DELIVERIES THEMSELVES TO MANHATTAN OF WHICH THEY ARE RELIEVED WHEN DELIVERY IS MADE BY THE HOBOKEN.

When the silk is delivered by the Erie on Manhattan Island the car has to be switched out of the train at Jersey City, placed on a carfloat and floated over to New York (R. 160). A special float movement would be made for only one or two cars (R. 164). The Trunk Line then unloads the silk from the car and makes delivery (R. 162, 163). When delivery is made through the Hoboken, the Trunk Line is not concerned with any unloading expense. It simply leaves the cars on the interchange track of the Hoboken (R. 161).

The Assistant to the Vice-President of the Erie Railroad agreed that the delivery of silk by carfloat at the water terminals in New York City is claimed by the Trunk Lines to be more expensive than any other deliveries (R. 167). The cost to the Trunk Lines of making delivery of silk by carfloat to Manhattan, a service which they had formerly performed before the delivery was made by the Hoboken, was computed as $124 per car, $6.20 per ton, or 31 cents per 100 pounds. The details of the computation were testified to at length (R. 79-82).

THE DIVISION OF THE RATE BETWEEN THE WESTERN TRANSCONTINENTAL LINES AND THE EASTERN TRUNK LINES.

Of the $9 rate, the lines east of Chicago receive 27.5 per cent., or $2.475 per 100 pounds. The western lines

receive 72.5 per cent., or $6.525 per 100 pounds (R. 135, 136).

The Division Allowed to the Hoboken on Silk.

In spite of the fact that the Hoboken's cost of handling the silk was 22.23 cents per 100 pounds, and notwithstanding that if the Trunk Lines had allowed the Hoboken its full cost as its division, the terminal expense to the Trunk Lines would have been about 9 cents less than the expense which they had incurred in making delivery of silk themselves, they allowed the Hoboken only $1.05 per ton or 5¼ cents per 100 pounds, this being the division allowed to it on ordinary less-than-carload freight (R. 71). The Hoboken therefore was compelled to incur a loss of approximately 17 cents per 100 pounds on all the silk delivered to it by the Trunk Lines.

Financial Data as to the Transcontinental and Trunk Lines.

Besides the evidence above outlined, indicating that after allowing the Hoboken a division sufficient to pay its costs, the handling of the silk by the Hoboken would result in increased revenue of about 9 cents per 100 pounds to the Trunk Lines from the silk shipments, there were introduced in evidence two exhibits. One showed railway revenues and expenses of the railways and large switching and terminal companies of the United States for 1925 and 1926 showing a substantial increase in most items in the latter year over the former and showing the rates of return of the carriers in the eastern and western districts respectively, in which districts the defendants were among the principal lines (R. 199). The other showed for individual rail-

roads in the western region their property investment, net railway operating income and rate of return (R. 201).

Comparisons with Other Terminal Lines.

There was detailed evidence as to the allowances paid to other terminal lines in New York Harbor and elsewhere and the services covered by them, with which the allowance to and operations of the Hoboken were compared (R. 150-157, 169-171, 203).

The transcontinental lines and railroads in the western district are not concerned with and have no knowledge of the subdivisions of portions of the through rates accruing to the lines east of Chicago. They assume the divisions paid to the terminal lines connecting with them, and expect the eastern roads to assume the divisions of terminal lines with which the latter connect (R. 134). In 1922, the eastern lines' division of the through rate was increased from 25 to 27.5 per cent (R. 135). One of the reasons for this increase was the terminal costs at the Atlantic seaboard (R. 137).

Importance of the Continued Operation of the Hoboken to the Community Served by it.

A witness for the Hoboken Chamber of Commerce testified that this organization considers the Hoboken an essential factor in the commerce and industry of the City of Hoboken. It is the only rail service maintaining direct connection with the piers of twelve ocean steamship lines, the factory buildings housing several industries, and the two largest warehouse developments in the city. It occupies a strategic position along practically the entire waterfront of Hoboken "and the industries locating on this waterfront in the future will be dependent upon the con-

tinued operation of the Hoboken Manufacturers' Railroad" (R. 132).

The Evidence on the Second Hearing.

The evidence taken at the further hearing included evidence produced by the Hoboken to show that the method of handling silk and the cost to the Hoboken of the service performed by it on silk shipments remained the same as testified to at the original hearing (R. 236). There was testimony that the Trunk Lines were also making delivery at their own float stations (R. 249). There was testimony as to the book and appraised value of the Hoboken properties (R. 283-285-287-289). It was shown that even with the increased division determined by the Commission, the net income of the Hoboken for the first five months of 1928 was only $23,000, as compared with a net income of $123,000 necessary to afford a return of 5¾ per cent. of the value of its property (R. 289-290). There was then shown an analysis of the silk shipments, indicating that there were on an average seven separate shipments in each car (R. 317). The revenue remaining to the transcontinental and trunk line carriers on the $9.00 rate on silk after the payment of a division of 22 cents to the Hoboken was compared with the revenue received by these lines from the transportation of other freight. It was shown that silk shipments under the $9.00 rate produced average freight charges of $3,617.24 per car, as compared with earnings received by the transcontinental lines under rates on many other kinds of freight averaging only $443 per car for shipments from the Pacific Coast ports to New York Harbor (R. 317, 327). There was evidence that after a division of 22 cents to the Hoboken, the earnings remaining to the transcontinental lines

from the $9.00 rate on silk were many times greater than their earnings for handling transcontinental shipments of highly perishable fruits and vegetables or from the transcontinental transportation of passengers (R. 329, 331, 337). There were also financial statistics as to the various transcontinental and Trunk Lines compared with similar statistics for the Hoboken and showing that from all of its traffic the Hoboken earned a much lesser return on its investment than all but one or two of the large railroad lines (R. 333, 339).

Finally, a stipulation was entered into that all of the railroad parties to the proceeding were efficiently operated, were of importance to the public, and that their continued operation was in the public interest (R. 256).

Specification of the Assigned Errors Intended to be Urged.

This appellant intends to urge all of the errors assigned as follows (R. 46, 47):

The District Court erred:

1. In setting aside, annulling, and permanently enjoining the Commission's orders of November 5, 1927, and May 7, 1929.

2. In holding that the Commission's order of November 5, 1927 was void because not supported by sufficient evidence.

3. In holding that the testimony offered at the hearing which preceded the Commission's orders of November 5, 1927 "fell far short of a compliance with the terms of the act".

4. In holding that the Commission's order of November 5, 1927 was based "so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue".

5. In holding that the Commission's order of November 5, 1927 was made "without any reference to the services performed by the trunk lines, or their condition, efficiency, and need of revenue".

6. In not holding that the order of November 5, 1927 constituted a valid determination of the future just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company.

7. In not holding that the order of November 5, 1927, was a valid order in so far as it fixed the just, reasonable, and equitable division to be received by the Hoboken Manufacturers' Railroad Company on and after thirty days from its date, or December 5, 1927.

8. In holding that the Commission's order of May 7, 1929, because of the absence of evidence required by the applicable statute to support it, as well as because of its retroactive feature, was null and void.

9. In holding that the Commission's orders of November 5, 1927 and May 7, 1929 were "made in the absence of certain evidence necessary to be considered by the Commission in fixing such rates (divisions), and therefore failed to meet the statutory requirements".

10. In not holding that the Commission's order of May 7, 1929, which corrected or modified the order of November 5, 1927 so as to make the latter order effective December

5, 1927 instead of August 6, 1926, was a valid order and that it was within the power of the Commission and proper by its order of May 7, 1929 to correct or modify its order of November 5, 1927 so as to change the effective date thereof from August 6, 1926 to a date thirty days subsequent to the date of the order of November 5, 1927, or December 5, 1927.

11. In not dismissing the petition.

Summary of Argument.

POINT I. The Commission, in making its order of November 5, 1927, fully complied with the requirements of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it and this order, being one as to the division to be received by the Hoboken out of the joint through rate for the transportation of one commodity alone, silk, was amply supported by substantial evidence, including sufficient evidence on the matters specified in Section 15 (6).

A full hearing was accorded.

Section 15 (6) requires "due consideration" of the factors specified. Whether this was accorded depends upon the sufficiency of the evidence before the Commission.

(*a*) The weight to be given to the evidence and conclusions to be drawn therefrom were matters for the Commission to determine and its determination is not subject to review.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268, 271;

Int. Com. Comm. v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547.

The Commission's findings that the Hoboken's cost of handling silk included items for insurance carried by the Hoboken and for compensation paid to the United States Testing Company for acting as the Hoboken's agent being amply supported by the evidence, are not subject to review and the case must be decided in the light of the Commission's finding as to the Hoboken's cost of handling the silk traffic.

(*b*) Distinguishing features of this case bearing upon the question whether Section 15 (6) was complied with.

The case involves the determination of the division of a rate on a single commodity and not a general revision of divisions on all freight.

The division formerly allowed to the Hoboken, which was complained of, represented only one-fourth of the Hoboken's cost of handling the traffic, and it was not contended by the appellees and their connections that the remainder of the rate left to them would be non-compensatory after deducting the division found reasonable by the Commission for the Hoboken.

There was no contention that the evidence which was claimed to be lacking would have required a different conclusion, and the Commission's affirmance of its original decision after the rehearing negatives such a contention.

(*c*) The record before the Commission on the first hearing included substantial evidence with respect to the factors specified in Section 15 (6) in so far as they were pertinent to the division to be received by the Hoboken from the $9 rate for the transportation of silk.

Efficiency of Operation.

The best proof of efficiency of operation is a description of the operations, from which the Commis-

sion can conclude whether or not they were efficiently performed.

The evidence fully indicated the services of the transcontinental lines and the expedited service accorded to the silk in transporting it from the Pacific Coast and the operations of the Hoboken in handling silk were described in detail. The Commission expressly considered the question of the efficiency of the Hoboken's arrangements in connection with silk.

Revenue Requirements.

The record before the Commission contained exhibits of financial statistics, expenses and revenue needs of the carriers in the eastern and western regions embracing the appellees and their connections. The evidence also showed that the Trunk Lines would benefit financially by the arrangement with the Hoboken because the Hoboken's service was a substitute for a service which had cost the Trunk Lines 31 cents per 100 pounds.

So far as the Hoboken was concerned, the evidence showed that the division allowed it by the Trunk Lines for handling the silk was 5¼ cents and that the cost to the Hoboken for this handling was 22.23 cents. The details of this figure, the taxes, operating expenses, rents, etc., of the Hoboken were shown.

Importance to the Public.

There was evidence as to the necessity of the continued operation of the Hoboken for the service of the City of Hoboken and the industries and steamship piers there located.

The Commission is entitled to take judicial notice of the importance to the public of the continued operation of the large Trunk Lines.

WHETHER AN ORIGINATING, INTERMEDIATE OR DELIVERING LINE.

The record contained evidence as to the handling of silk, showing that the lines on the Pacific Coast were the originating lines, the Trunk Lines and other transcontinental lines were the intermediate lines, and the Hoboken was the delivering line.

ANY OTHER FACT.

There was substantial evidence as to the characteristics of silk; the expenses incurred by the Hoboken in the handling of it which are not incurred in the handling of ordinary freight and which have no relation to the mileage haul of the Hoboken; the divisions paid to other terminal lines, and their services; the history of the divisions, etc.

(*d*) To hold that in this case, involving the Hoboken's division of the rate on silk alone, this evidence failed to satisfy the requirements of Section 15 (6) would involve a disregard of the words "due consideration" and require an unreasonable construction of the statute.

The statute should be construed as meaning that consideration of the factors specified is "due" only in so far as they may be pertinent to the issues before the Commission and helpful to it in determining those issues.

In a case involving the division of a single rate on one commodity, evidence as to the factors specified in Section 15 (6) with respect to the general operations of the railroads and revenues from all traffic is not pertinent, and evidence as to such factors can be pertinent only in so far as they relate to the transportation of the one commodity involved. The decisions in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, *U. S.* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274, and *New England Divisions Case*, 261 U. S. 184, are distinguish-

able because they involved a readjustment of divisions on all freight, but the views there expressed support the contention here as to the proper interpretation of Section 15 (6).

The difference between the character of evidence which is pertinent in a case involving the division of a single rate on a single commodity and that which is pertinent in a case involving a general readjustment of divisions on all freight is similar to the difference between the evidence which is pertinent to the determination of a reasonable rate on one commodity and the evidence which is helpful to the Commission in prescribing a general readjustment of all rates for revenue purposes.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74.

Evidence as to general financial needs of a railroad or general operating efficiency is not helpful or pertinent in determining the reasonableness of an individual rate.

Int. Com. Comm. v. *Union Pacific R. R. Co.*, 222 U. S. 541;

Dayton-Goose Creek Railway Co. v. *United States*, 263 U. S. 456, 482.

(*e*) This contention is borne out by a consideration of the purposes of Section 15 (6).

Section 15 (6) in its present form was part of the Transportation Act and was designed to afford the machinery for carrying into effect the provisions of that act for distributing the railroad funds raised under the rate-making provisions of the act, Section 15 (a).

New England Divisions Case, supra.

Formerly the Commission determined reasonable

divisions of individual rates in the light of facts similar to those considered by it here.

Stonega Coke & Coal Co. v. *B. & N. R. R. Co.*, 39 I. C. C. 523.

In view of its purpose, Section 15 (6) should be construed as enlarging rather than as restricting the power of the Commission.

POINT II. Since the Commission, in making its determination and order of November 5, 1927, complied with the requirements of Section 15 (6) with respect to the matters to be considered by it, its decision and order constituted a valid determination of the future just, reasonable and equitable division to be received by the Hoboken, and its order was a valid order in so far as it fixed the division to be received by that company on and after thirty days from its date, or December 5, 1927.

While so much of the Commission's first order as directed that it should take effect on August 6, 1926 was invalid, the Commission made a finding of the reasonable division to be received by the Hoboken for the future and its order prescribed the division for the future. The invalid portion was separable and the court therefore erred in enjoining the order in its entirety and in not enjoining it only in so far as it attempted to operate retroactively.

Int. Com. Comm. v. *Diffenbaugh*, 222 U. S. 42, 49.

Chicago & A. R. Co. v. *Interstate Commerce Commission*, 173 Fed. 930 (reversed on other grounds in *Interstate Com. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452).

Chicago, M., St. Paul & P. R. Co. v. *United States*, 33 Fed. (2d), 582.

At most, since the order was valid for the future, the invalidity of the last paragraph made it an order issued without an effective date named therein and it therefore took effect on the earliest date when under the Act it could become operative, namely, thirty days from its issuance.

Interstate Commerce Act, Section 15 (2).

It was analogous to a legislative act without an effective date, which takes effect upon passage or upon the earliest date permitted by constitutional provisions.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210, 226.
Terminal Railroad Assn. v. *United States*, 266 U. S. 17, 30.
Matthews v. *Zane*, 7 Wheat. (U. S.) 164, 211.
State ex rel. v. *Milroy*, 88 Ohio 301.
Ross v. *New England Mortgage Security Co.*, 101 Ala. 362.

POINT III. The Commission in making its order of May 7, 1929, fully complied with the requirements of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it, and this order was amply supported by substantial evidence including sufficient evidence as to the matters referred to in said section.

The court below so determined.

POINT IV. The Commission's order of May 7, 1929 properly amended its former order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 6, 1926.

Section 16 (a) of the Interstate Commerce Act authorizes the Commission to reverse, change or modify its original orders.

L. & N. R. Co. v. *Sloss-Sheffield Co.*, 269 U. S. 217; *Pennsylvania R. Co.* v. *United States*, 288 Fed. 88.

This is also contemplated by Section 15 (2).

Since the first order was valid as to the future and under the law should take effect as of thirty days from its date, it was within the power of the Commission by its second order of May 7, 1929 to correct or amend the first order to read as it should have read originally.

The original order was not set aside by the Commission when it granted the rehearing, and therefore remained within its control.

During the entire period following the first decision, the appellants and their connections were violating the Interstate Commerce Act in not maintaining just and reasonable divisions on the transportation of silk. The Commission's first order was designed to prevent such violation and require compliance with the statute. After the rehearing, it affirmed its original decision and its second order was designed to correct the form of the first order to make it accomplish this purpose. It was within the Commission's power to do this.

Section 15 (6) does not except orders fixing divisions from the operation of the general provision of the Act such as Sections 15 (2) and 16 (a).

The decision in the *Brimstone* case with respect to the lack of power of the Commission to make a retroactive order relating to divisions does not apply to an order merely correcting a previous order, issued after full hearing.

POINT V. The order of May 7, 1929 was a valid order for the future.

Even if, contrary to the foregoing contention, the second order was invalid in so far as it modified the

first order, nevertheless, being supported by ample evidence, it constituted a valid determination of the Hoboken's division for the future.

POINT VI. The judgment of the court below should be reversed.

ARGUMENT.

POINT I.

The Commission, in making its order of November 5, 1927, fully complied with the provisions of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it; and this order, being one as to the division to be received by the Hoboken out of the joint through rate for the transportation of one commodity alone, silk, was amply supported by substantial evidence, including sufficient evidence on the matters specified in Section 15 (6).

Section 1 (4) of the Interstate Commerce Act (41 Stat. L. 474) provides:

> "(4) It shall be the duty of every common carrier subject to this chapter * * * in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Section 15 (6) of the Interstate Commerce Act (41 Stat. L. 484) is as follows:

> "(6) Whenever, after full hearing upon complaint

or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. *In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.*" (Italics ours.)

No contention is made that a "full hearing" was not had, as required by this section, but the court below held that the Commission failed to comply with the provisions in italics.

The requirement of the statute is that "*due* consideration" be given to the factors specified. The first question here presented, therefore, is whether the Commission accorded such due consideration in this case. The determination of the latter question in turn depends upon the sufficiency of the evidence before the Commission, since it is not contended, and the court below did not find, that the Commission failed to give due consideration to all the evidence in the record before it.

We submit that the evidence in the present record satisfied the requirements of the statute and that there is nothing in the decisions of this Court requiring the conclusion that under the circumstances of this case such evidence was insufficient to enable the Commission to reach a determination.

A. The weight to be given the evidence and the conclusions to be drawn therefrom were matters for the Commission to determine, and its determination is not subject to review.

This point is so well settled by the decisions of this Court that no further argument upon it is necessary.

Western Paper Makers' Chemical Co. v. *United States*, 271 U. S. 268, 271;
Int. Com. Comm. v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547.

Indeed, the point would not be mentioned at all were it not that in the court below, the appellees again suggested

the contention urged by them before the Commission (R. 210) and rejected by it (R. 211), that the items of the Hoboken's expense resulting from its arrangement with the Testing Company and from its insurance policy were not properly to be included in determining the Hoboken's total cost of handling the silk shipments.

The Commission upheld the arrangement with the Testing Company, saying (R. 209):

> "Complainant states that its warehouse is not adequate to store the silk nor is its labor sufficiently skilled to unload or otherwise handle it. For those reasons it is necessary to employ the Testing Company to unload, store, and deliver the silk to consignees."

And with respect to the insurance, the Commission in its report found (R. 211):

> "The costs of handling silk over that of handling other traffic are shown by complainant to be the cost of terminal insurance, policing, unloading, storing and delivering. There can be no doubt of the increased risk in handling silk, and in the interest of efficient and economical operation, the necessity for insurance and policing is obvious."

There being a very considerable amount of evidence upon these features, the Commission's findings under the principle of the decisions above cited are clearly conclusive, whether or not the court might itself be disposed to reach a different conclusion on the evidence.

As Mr. Justice BRANDEIS said in the opinion of this Court in *New England Divisions Case*, 261 U. S. 184, at p. 204:

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province.

Manufacturers Ry. Co. v. *United States*, 246 U. S. 457; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62."

As a matter of fact, we believe that a reading of the record before the Commission clearly indicates that no other conclusion was possible as to the expense incurred by the Hoboken in handling silk than that reached by the Commission.

Therefore these findings of the Commission are to be accepted as part of the background in the light of which the question here considered must be determined.

B. Distinguishing features of this case bearing upon the question whether Section 15 (6) was complied with.

The following features of the proceeding before the Commission, we submit, have an important bearing upon the question of the sufficiency of the evidence presented at the first hearing:

1. The proceeding concerns the division of but one rate on one particular commodity and was not a proceeding for a general revision of the divisions to be received by a carrier or group of carriers out of all of their rates on all freight. In this respect the present case differs from other proceedings, in which the Commission's orders have been passed upon by this Court in decisions relied upon by the appellees and the court below, which will be discussed later.

2. The Hoboken's complaint to the Commission sought an increase only in the division received by it, and there was before the Commission no question of a revision of

the divisions received by all the several carriers participating in the transportation.

3. The commodity upon which this rate applied—silk—was one of unusually high value as compared with ordinary freight, and the handling of this extraordinary commodity involved special services and unusual risks and expenses for the Hoboken as terminal carrier.

4. The joint through rate out of which the Hoboken sought an increased division was an unusually high rate ($9.00 per 100 pounds compared with rates of from $.90 to $4.95 on many other articles (R. 326-331)).

5. Notwithstanding these facts, the appellees and their connections allowed the Hoboken a division out of this rate no higher than the division allowed to it out of the joint rates on ordinary freight.

6. This division, which the Hoboken sought to have increased, was only about one-fourth of the cost to it of the terminal service performed by it with respect to this silk, as shown by the evidence at the first hearing (R. 191) and as found by the Commission (R. 209). This fact distinguishes the present case from other cases which have been before this Court involving orders of the Commission prescribing divisions, since this is the first case to come before this Court where the division sought to be changed by the Commission's order was shown to afford less than the cost of handling the traffic covered by the rate and therefore to be confiscatory.

7. It was not contended by the appellees that the balance of the rate remaining to them and their connections

after deducting the increased division prescribed for the Hoboken was or would be non-compensatory or inadequate.

8. The Hoboken is a short switching line performing only a terminal service with respect to this silk, and its services and costs could in no way depend upon the general financial condition, efficiency of operation, etc., of the large transcontinental lines, many of them a thousand miles away. Nor could it have knowledge of these facts.

The foregoing features of this proceeding are important here because, as we contend, if the language of the Act is to be properly and reasonably interpreted, the character and extent of the evidence which must be before the Commission and which it is required to consider in any individual case must depend upon the nature of the issues before it and the particular circumstances of that case: Otherwise, we submit, the words "*due* consideration" will not be given their true significance.

It is to be noted further, as will later be more fully pointed out, that most of the evidence which the court below apparently considered lacking (erroneously as we contend), was evidence as to the appellees and their connections, which was naturally easily available to them and the production of which would have imposed a great burden on the Hoboken. It is submitted that the appellees, who had every opportunity to produce the evidence, should not be permitted now to defeat the Commission's order by the plea that this evidence was lacking.

Oregon R. R. & N. Co. v. *Fairchild*, 224 U. S. 510, 526, 527.

Further than this, however, it is not contended that the evidence which it is claimed was lacking on the first hearing, would, if it had been produced, have required a different conclusion. Indeed, the very fact that after the second hearing, when it was the view of the lower court that the evidence was sufficient, the Commission affirmed its original decision, negatives any such contention.

C. The record before the Commission on the first hearing included substantial evidence as to the factors specified in Section 15 (6) with respect to the division to be received by the Hoboken from the $9.00 rate for the transportation of silk.

The $9 rate on silk was a rate voluntarily established by the carriers. It was, therefore, presumably compensatory for the entire transportation. On the other hand, the share of this rate allowed to the Hoboken represented only one-fourth of the cost of its portion of the transportation services. It was plainly confiscatory and was therefore not a division that the Commission could have prescribed. The 22-cent division which the Commission fixed was barely enough to meet the Hoboken's cost of handling the silk. And it is not claimed that the balance of $8.78 was non-compensatory to the appellees and their connections. Such a contention cannot be advanced here.

Beaumont, Sour Lake & Western Ry. Co. v. *United States*, 282 U. S. 74, 79.

The proof of these facts alone, should, we submit, be sufficient to sustain the Commissions order in a proceeding involving the division of a single rate on one commodity. But further than this, we submit that if Section 15 (6) be

construed as also requiring, in such a case, consideration of evidence as to each of the particular factors specified therein, the court below erred in holding that such evidence was lacking here. These factors will be considered in order.

Efficiency of Operation.

The first item specified in Section 15 (6) is "the efficiency with which the carriers concerned are operated."

The record before the Commission on the first hearing showed in detail the way in which silk was being handled by the Hoboken. There were descriptions of the Hoboken's operations on other freight. There was evidence as to the way in which the transcontinental lines and the Hoboken's connections handled silk. It was testified that the silk was transported practically in passenger service, in trainload lots from the Pacific Coast to Hoboken. There was testimony as to the guarding of the silk in transit, as to the insurance placed thereon by the various carriers to cover their risks, and opinions as to whether their practices in these respects constituted efficient operation in the handling of the silk traffic. The very words "efficient operation" occurred several times in the record of the first hearing.

For example, there was a question whether it was efficient operation for the Hoboken to employ the Testing Company to handle this silk.

> "Q. (Mr. Carmalt): The facility that is there offered is convenient for an efficient operation?
> A. (Mr. O'Neal): It is." (R. 85.)

Again:

> "Q. (Mr. Carmalt): Are you able to judge on the question of whether or not the service that is given by

that road on that traffic is as efficient as the other roads in the region?

A. (Mr. O'Brien): We have been highly commended by the other roads on the way we have handled the cars * * *." (R. 107.)

There was testimony as to whether from the standpoint of the Trunk Lines it was efficient operation to have the silk delivered by the Hoboken rather than transported across the Hudson River for delivery at their own terminals (R. 113, 114, 116).

What is evidence of efficiency of operation if it is not descriptions of how the operations are performed, from which the Commission can itself decide whether the freight is being economically and efficiently handled? And of such descriptions there was no lack (see *supra*, pp. 12-14).

That the Commission particularly considered the element of efficiency is indicated by its report, in which it reviewed the evidence of how this silk was handled. Among other things the Commission said:

> "There can be no doubt of the increased risk in handling silk and in the interest of *efficient and economical operation* the necessity for insurance and policing is obvious." (Italics ours.) (R. 211.)

Revenue Requirements.

The next item is "the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railroad property held for and used in the service of transportation".

An exhibit marked Exhibit No. 4 (R. 199) was put in evidence, which showed the operating revenues and expenses and taxes of all the railroads of the country by

regions for the year 1925 and the first eight months of 1926, together with the rates of return on their property. Another exhibit, Exhibit No. 5 (R. 201), showed more detailed evidence as to financial operations and needs of the western carriers. With these figures before it the Commission could certainly conclude that the Trunk Lines and transcontinental lines as a whole were not in such desperate financial condition that they could not afford to accord to the Hoboken 17 cents more per 100 pounds for the handling of silk, to enable the Hoboken to meet the costs of this handling, especially when the $9 rate had been voluntarily established and maintained and when there was and could obviously be no claim that the balance of the rate remaining to the transcontinental and Trunk Lines was confiscatory.

In this connection, attention is again directed to the evidence that if the silk were not delivered to consignees by the Hoboken, delivery would have had to be made by the Trunk Lines themselves or through other terminal companies, and that the expense of deliveries by the Trunk Lines themselves would probably be greater than the increased division to the Hoboken (R. 82). This was something which the Commission had before it, bearing upon the revenue effect of the arrangement with the Hoboken, so far as the Trunk Lines were concerned.

From the standpoint of the Hoboken, there was evidence as to its switching expenses, its taxes, rents, and special expenses in the handling of silk. There was certainly proof of its need for added revenue from the transportation of silk, since there was extensive and convincing evidence that it cost the Hoboken 22.23 cents per 100 pounds to handle the silk (see *supra*, pp. 4, 14, 15) and that

the Trunk Lines allowed it a division of only 5¼ cents. It is well settled that, regardless of its total financial condition, a carrier cannot be required to transport a given commodity at less than cost (*Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585) and with its existing division amounting to only one-quarter of its operating cost of handling the traffic, without reference to a fair return on its investment, the Commission was plainly entitled to consider this fact as proof of the Hoboken's need for additional income on this traffic. Bearing in mind that "The 1920 Act (of which Section 15 (6) was a part) sought to ensure, also, adequate transportation service", as this Court said in the *New England Divisions Case, supra*, p. 189, it is obvious that the evidence as to the Hoboken's costs constituted proof for the Commission to consider that the silk traffic, under the division complained of, was not promoting the ability of the Hoboken to serve the public adequately.

Indeed, it was apparently the opinion of the court below that the Commission gave too much consideration to the financial requirements of the Hoboken, for it said:

> "It (the order) seems to have been based altogether, so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue, * * *. In other words, its point of view was essentially parochial * * *" (R. 41.)

To the extent that it was the view of the court that the increased division was prescribed solely because of the Hoboken's need of additional general revenue, we think it erred. But the need for added revenue *from the silk traffic*, to meet the cost of handling that traffic, was undoubtedly

considered and recognized by the Commission. And we submit that this, together with the foregoing evidence as to the Trunk Lines and transcontinental lines, met the requirement of this item of the statute in a case involving the division of a rate on silk alone.

Importance to the Public.

The third item specified in Section 15 (6) is the "importance to the public of the transportation service of such carriers".

The Hoboken is a small railroad, less well known than the large transcontinental lines. Therefore evidence as to its importance was produced (R. 132) in the shape of testimony given on behalf of the Hoboken Chamber of Commerce as to the importance of the Hoboken to that community, the industries and steamship piers served by it, etc. As to the Trunk Lines, it seems absurd to suggest that the Commission could not assume the importance to the public interest of the continued operation of the large trunk line and transcontinental roads handling this silk, such as the New York Central, the Erie, the Grand Trunk, the Union Pacific, etc. We do not believe the Court will hold that the Commission without evidence could not take judicial notice of this fact, or that it failed to give it due consideration.

Whether an Originating, Intermediate, or Delivering Line.

The remaining item specified is "whether any particular participating carrier is an originating, intermediate, or delivering line."

It certainly cannot be said that the Commission failed

to consider this item. The record on the original hearing shows (R. 113, 115, 125, 173) and the Commission found (R. 208) that the Hoboken was the delivering line as to silk; that the silk was imported through the Pacific Coast ports, that the carriers receiving the silk at those ports were the originating carriers, and that the other railroads bringing the silk across the country were intermediate carriers.

The fact that the Hoboken was the delivering line of the silk shipments was of especial importance since it was because of the services incumbent upon it as delivering carrier that the Hoboken incurred the expenses which it did. The context of the section supports the view that the Commission was entitled to base its determination to a large degree upon the fact of this terminal service and its consequent expense, without regard to the length of the Hoboken's haul compared with the total transportation service in connection with the silk shipments.

Any Other Fact.

Section 15 (6) then concludes with the requirement that the Commission consider "any other fact or circumstance" which would, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another.

The court below does not suggest what other factors should have been considered by the Commission under this language. It is plain, however, that the Commission did consider other factors. There is evidence in detail as to the way the silk was handled (R. 70-78, 85, 102-107), as to the expenses incurred by the Hoboken because of its service as the delivering carrier (R. 72-78, 191), as to the ter-

minal service of which the Trunk Lines were relieved by the Hoboken operation (R. 78-83), as to the divisions paid to the Hoboken on ordinary freight as compared to this extraordinary silk (R. 71, 119, 127) and as to the divisions paid to other terminal lines (R. 117, 126, 203).

All of these facts were before the Commission in the record at the first hearing.

We accordingly submit that since the issue before the Commission was the reasonable division to be received by the Hoboken out of a single and extraordinary rate on silk, there was sufficient evidence before the Commission bearing upon this issue to satisfy the requirements of Section 15 (6), and that it should not now be held that the Commission failed to comply with those requirements.

We also submit that the lower court erred in holding that the Commission's first determination and order were made "without any reference to the services performed by the trunk lines, or their condition, efficiency and need of revenue" (R. 41).

In considering the merits of the appellees' contention that the record on the original hearing was insufficient, it is significant that on the rehearing, the appellees and their connections produced little evidence, although the decision of this Court in *Brimstone R. R. Co.* v. *United States*, 276 U. S. 104, had been announced in the meantime and although the appellees made no serious contention that the record following the rehearing was insufficient to satisfy the requirements of Section 15 (6). The only additions to the record produced by the appellees and their connections as the result of the rehearing were, (1) a financial statement for the individual Trunk Lines containing information similar to that shown on the original hearing for the carriers in the different regions as

a whole (R. 339) and (2) a stipulation that "the complainants and defendants stipulated that they each of t' re-spectively are efficiently operated and are of impor to the public, and of such importance that their continued operation is in the public interest" (R. 256). If it is to be held that the Commission in making its original order failed to comply with the statute because such a stipulation was not made at the first hearing, it would certainly mean placing a highly artificial construction upon the language of the Act and sacrificing substance to form. We submit that in the absence of proof to the contrary, the Commission was entitled to assume without stipulation the existence of the facts stated therein.

D. To hold that in this case, involving the Hoboken's division of a rate on silk alone, this evidence failed to satisfy the requirements of Section 15 (6) would involve a disregard of the words "due consideration" and require an unreasonable construction of the statute.

The opinion of the lower court does not indicate clearly what additional evidence should, in its view, have been before the Commission to satisfy Section 15 (6). But after an examination of the evidence which actually was before the Commission on the first hearing, we submit that the fact that the lower court found this evidence insufficient leads necessarily to the inference that it was the court's opinion that regardless of the nature of the particular issues before the Commission or the character of the relief sought, and regardless of its relevancy to such issues, there must be before the Commission full evidence as to all of the factors specified, with respect to all traffic and with respect to each and every carrier party to the proceeding.

This, we submit, represents an erroneous view of the meaning of the statute.

What is "due consideration" in a particular proceeding must depend upon the nature of the issues which the Commission is called upon to decide and the character of the relief sought. It seems clear that little or no consideration can be "due" to factors which cannot by any stretch of the imagination aid the Commission in deciding the particular issues before it or affect its determination.

In the case of *Poland* v. *McDowell*, 114 Me. 511, 512, the trial court upon the plaintiff's request included the following instruction in his charge to the jury:

> "You are to give due consideration to all testimony that has been deemed admissible by the court."

Then the trial court added the following qualification:

> "That due consideration means that you are to consider it as far as it has any bearing as proving the issue in this case, and not as proving anything else."

The appellate court held that there was no error in this qualification.

In *Smyth* v. *Ames*, 169 U. S. 466, at pages 546 and 547, Mr. Justice HARLAN, in giving the opinion of this Court, after outlining the various factors affecting value, said that these factors

> "are to be given such weight as may be just and right in each case."

Since the principles outlined in this decision constitute an important part of the background of Section 15 (a) of the Interstate Commerce Act, where the words "due consideration" also appear, the language quoted is of especial interest here.

It is surely imposing an unreasonable construction on Section 15 (6) and one that would render its validity doubtful to hold that it requires that a complainant, as a condition to securing relief, must produce and that the Commission must have before it and consider evidence which cannot in any way aid it in determining the particular issue before it and which is not pertinent to the matter in hand.

For example, in a case involving the division of a single rate on a particular commodity, evidence as to the factors specified in Section 15 (6) can hardly be pertinent except as they may relate to the transportation of that commodity.

On the other hand, if a railroad or group of railroads is seeking a general revision of the divisions of all rates on all traffic interchanged with another railroad or group of railroads, then an inquiry into the general revenue needs of the different railroads, the efficiency with which their respective operations are as a whole conducted, and the relative importance to the public of the general transportation services performed by them, would be pertinent. Such were the facts in *Brimstone R. R. Co.* v. *United States, supra; United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274; and *New England Divisions Case, supra,* relied upon by the appellees in the court below and doubtless to be relied upon by them here.

Again, where the Commission is asked to revise the division to be received by a small terminal railroad out of a rate covering transportation entirely across the continent performed by a large number of railroads, evidence as to the general financial needs of each one of these railroads and evidence as to the efficiency of their respective general railroad operations or of their operations in the handling of some other kind of freight, can hardly be con-

sidered pertinent or helpful to the Commission. Thus it is difficult to see how the reasonableness of the division to be received by the Hoboken out of this particular through rate for the transportation of silk can in any way depend upon the general efficiency of operation of the Southern Pacific Railroad, for example, or the efficiency with which the Canadian Pacific Railroad, or any other of the great transcontinental systems over which silk is but one of thousands of commodities transported, handles coal, or iron, or fruit or any other freight, or upon the revenue required to meet taxes and operating expenses by the Santa Fe or the Grand Trunk or even the immediate connections of the Hoboken, such as the New York Central and the Erie.

If the Commission would not be aided in determining the issue before it by a consideration of these matters, then it is certainly putting a strained construction upon the language of the statute and ignoring the important words "*due* consideration", to hold that the statute nevertheless requires the Commission to consider and give weight to evidence as to these facts in such a case.

And if the Commission would not be required to give any weight to such evidence, it is putting an even more forced construction on the statute to say that nevertheless the evidence must be produced or the Commission may not act. It is, moreover, a construction which will render it difficult for a small terminal line to secure relief, since many of these matters are not within its knowledge and are difficult of proof by it.

We, therefore, submit that in determining the division of a single rate, Section 15 (6) should not be construed as requiring the Commission to have before it evidence as to the factors specified with respect to railroad operations as a whole and with respect to all railroads, but at most to

have evidence of the sort indicated by the items specified in so far as they relate to the handling of the particular commodity in question.

The contentions here made as to what constitutes "due consideration" of the factors specified in Section 15 (6) when the division of an individual rate is in issue find support in decisions relating to the determination of reasonable rates.

In *Beaumont, Sour Lake & Western Ry. Co.* v. *United States, supra,* this Court said, page 89:

> "The same rules as to pleading and proof apply to orders prescribing divisions as to laws fixing rates."

This Court has held that general matters such as financial needs, operating efficiency, or general public interest, are of little or no weight in determining the reasonableness of an individual rate and that these matters are important only when consideration is being given to a general readjustment of rates on all traffic. Thus in *Int. Com. Comm.* v. *Union Pacific R. R. Co., supra,* at page 549, the Court said:

> "Where the rates as a whole are under consideration, there is a possibility of deciding, with more or less certainty, whether the total earnings afford a reasonable return. But whether the carrier earned dividends or not sheds little light on the question as to whether the rate on a particular article is reasonable. For, if the carrier's total income enables it to declare a dividend, that would not justify an order requiring it to haul one class of goods for nothing, or for less than a reasonable rate. On the other hand, if the carrier earned no dividend, it would not have warranted an order fixing an unreasonably high rate on such article."

Again in *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, citing the last named case, the Court said at page 482:

> "It is argued that to cut down the operating profit of the stronger roads to a certain per cent. is not cutting or reducing rates, since the net income of a carrier has no proper relation to rates and cannot be used as evidence of their reasonableness. *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, and *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, are cited to this point. They merely decide that where the reasonableness of one rate or a class of rates is in issue, the total operating profit of the railroad or public utility is of little use in reaching a conclusion. This is shown by the words of Mr. Justice LAMAR, speaking for the Court, in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.* (p. 549): * * *."

and again at page 483:

> "There is nothing in the act requiring the use of the net return as evidence to fix a particular rate."

In *Northern Pac. Ry. Co.* v. *North Dakota, supra*, at page 604, this Court said:

> "When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business and show that it has been denied a fair return upon that value."

But the Court went on to say that:

> "* * * where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it

for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the State has exceeded its authority."

The precise question here under consideration, as to the extent and character of the evidence which must be before the Commission to satisfy the requirements of Section 15 (6) in a proceeding brought by a single terminal line to secure an increase in its division of one particular rate on a single commodity, has not heretofore been before this Court.

We submit, however, that the decisions of this Court in such cases as there have been, involving the Commission's authority to prescribe divisions of joint rates, not only afford no precedent for the interpretation of Section 15 (6) apparently placed upon it by the court below, but on the contrary support the contentions of the appellants as to the effect of Section 15 (6).

The first case of importance under this section of the Act subsequent to its amendment by the Transportation Act was *New England Divisions Case, supra.* This action involved a complaint to the Interstate Commerce Commission by the New England Railroads seeking increased divisions out of their joint through rates with their western connections.

The decision is important here because it indicates that Section 15 (6) of the Act is to be liberally construed to enable the Commission to carry out the broad purposes of the Transportation Act and to adjust earnings between carriers so that weak lines may continue to operate.

The decision is of further significance, moreover, in the

light of the apparent opinion of the court below that the Commission's order should be condemned because, as the court erroneously concluded, its determination was based largely upon the need of the Hoboken for additional revenue (R. 41). For if ever there was a case where the primary consideration of the Commission was the financial need of the petitioning roads, it was the *New England Divisions Case*, as the Commission's reports indicate, 62 I. C. C. 513, 66 I. C. C. 196, and yet the Commission's order granting them increased divisions was sustained by this Court.

The Commission's order in the *New England Divisions Case* was first challenged on the ground that "its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation" (p. 189). The Court rejected the contention that this invalidated the order, holding that the purpose of the Transportation Act was to preserve transportation services in the public interest and that the Commission was entitled to increase divisions when this was needed to preserve a weak line for the public service.

It was next contended "that if the Act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers, it is unconstitutional" (p. 195). The Court pointed out that there was no claim "that the apportionment results in confiscatory rates, nor is there in this Record any basis for such a contention." The Court sustained the Commission's action in the face of the objection, saying, among other things (p. 195):

> "'Cost of the service is one of the elements in rate making.'"

The Court also pointed out (p. 196):

> "The special needs of the New England lines were at all times before the Commission."

Finally the contention was made substantially the same as that made here that the order was unsupported by evidence required under Section 15 (6). This contention the Court rejected, Mr. Justice BRANDEIS saying (p. 203):

> "The contention that the order is unsupported by the evidence rests largely upon arguments which assume a construction of the statute which we hold to be erroneous, or upon expressions in the first report of the Commission, which, in view of the second report and order thereon, must be deemed to have been withdrawn. That the evidence was ample to support the order made, is shown in the opinion of the lower court, 282 Fed. 306, 308, 309, and in the reports of the Commission."

The next case to be considered is *United States, v. Abilene & Southern Ry. Co., supra,* commonly called the *Orient Divisions Case.* In that case this Court held the Commission's order invalid but did so upon grounds which cannot be urged against the order here under consideration: first, that in making its finding the Commission relied upon data in annual reports filed with it but not offered in evidence; and second, that there was no evidence of the individual rates or of typical rates to be divided but only evidence as to averages, which this Court held was not sufficient proof of the nature of the rates whose divisions were in issue. The conclusions of the Court, however, with respect to other objections raised to the validity of the Commission's order have a bearing upon the issues in the present case and support the contention here made for a practical construction of Section 15 (6).

Thus, after stating the substance of Section 15 (6), the Court said (pp. 284-285):

> "It is settled that in determining what the divisions should be, the Commission may, in the public interest, take into consideration the financial needs of a weaker road; and that it may be given a division larger than justice merely as between the parties would suggest 'in order to maintain it in effective operation as part of an adequate transportation system', provided the share left to its connections is 'adequate to avoid a confiscatory result'. *Dayton-Goose Creek Ry. Co.* v. *United States*, 263 U. S. 456, 477; *New England Divisions Case*, 261 U. S. 184, 194, 195. It was not contended before the Commission that a reduction of the carriers' divisions would reduce their rates below what is compensatory. There is in the record no evidence on which it could be determined that any of the divisions ordered will result in confiscatory rates."

The last part of the language quoted is plainly applicable to the case at bar. If the Commission can give a division "larger than justice * * * as between the parties would suggest", it can surely prescribe a division which covers only the complainant's costs.

In answer to the objection that the Commission was guided solely by the relative financial ability of the several carriers, the Court said:

> "It does not follow that such a basis of division would necessarily be unjust to the connecting carriers. The position of the Orient as the originating carrier, or as the delivering carrier, or as an indispensable intermediate carrier, might be such that the connecting carrier could not get the traffic but for the service which the Orient renders; and that this factor, together with others ignored in the existing divisions, would require the precise change directed to render

the divisions just and reasonable as between the parties."

The third decision and the one most vigorously urged upon the court below is *Brimstone R. R. Co.* v. *United States, supra.* It was following the decision in that case that the Commission reopened the present proceeding for further consideration, because of the Court's holding that Section 15 (6) does not authorize the Commission to require a readjustment of divisions retroactively to the date of the filing of the complaint seeking a change in such divisions where the joint through rates to be divided have not been specifically prescribed by the Commission. However, besides dealing with the retroactive feature of the Commission's order in the *Brimstone* case, the Court passed upon questions which were raised as to the sufficiency of the evidence before the Commission to meet the requirements of Section 15 (6). While it was held in that case that the requirements of Section 15 (6) had not been satisfied, it is submitted that the decision affords no precedent for a similar decision here since there are very important differences in the facts of the two cases.

The *Brimstone* case involved a proceeding before the Commission not for the revision of a particular rate on a single commodity, but for a general revision of divisions of all rates on all freight. Moreover, it was not a proceeding which originated upon the complaint of a carrier or group of carriers asking increased divisions, but was a proceeding instituted by the Commission on its own motion to determine whether or not because of its excessive earnings, the shipper controlling the Brimstone was securing an undue advantage or rebate, and whether on this account revenue should not be taken away from the Brimstone and given to its connections through the medium

of decreasing the Brimstone's division of all of its joint freight rates and increasing the divisions of its connections. Since such was the purpose of the inquiry and since the proceeding did not arise from a claim by the Brimstone's connections that their divisions were inadequate, the Commission's attention was directed primarily to the question whether or not the Brimstone's divisions yielded it an excessive return. Having found that they did, the Commission made an order decreasing the Brimstone's divisions and increasing those of its connections without, so far as appears from the Commission's reports or the decision of this Court, having given any consideration to the character of the traffic involved, the measure of the through rates or the revenue needs of the carriers whose divisions were thereby increased. This Court held that the Commission had failed to give due consideration to the items specified in Section 15 (6), saying (p. 115):

> "The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers'."

We submit that a decision that the Commission in making an order under these circumstances failed to comply with Section 15 (6) is far from requiring the conclusion that the Commission in the present case likewise failed to comply with this section; nor, as we submit, is there

any language in the Court's opinion supporting such a view.

Since the decision of the court below, this Court has decided the case of *Beaumont, Sour Lake & Western Ry. Co.* v. *United States, supra.* In that case this Court upheld an order of the Commission in the face of the contention that the evidence was not sufficient to meet the requirements of Section 15 (6). The proceeding involved a general revision of the divisions on all freight, and therefore evidence as to general financial needs, revenues and operating conditions was more pertinent than in the case at bar. The opinion of the Court, however, supports the contention that a broad and practical interpretation should be given to Section 15 (6). Thus it was said that the Commission

> "need not under all circumstances take specific evidence as to each rate of every carrier" (p. 82).

We therefore urge that in determining whether the Commission has complied with the requirement that it give *due* consideration to the matters specified, attention must be given to the nature of the proceeding before the Commission, the character of the relief sought, and the extent to which a consideration of these matters may be relevant or helpful to the Commission in passing upon the particular issues before it, and that in the light of these considerations the evidence here was sufficient.

E. This contention is borne out by a consideration of the purposes of Section 15 (6).

In considering the construction to be placed upon Section 15 (6), sight should not be lost of the fact that the particular portion of this section here discussed was im-

ported into the Act by the Transportation Act of 1920 and was a part of the general scheme of Congress to confer broad powers upon the Commission to deal with railroad freight rates for the maintenance of an efficient transportation system for the country.

Prior to the Transportation Act, Section 15 of the Act to Regulate Commerce had conferred upon the Commission authority under certain circumstances to prescribe the just and reasonable proportion of a joint rate to be received by each carrier.*

The Transportation Act, however, gave the Commission broader powers in order "to insure * * * adequate transportation and services",

New England Divisions Case, supra, 191.

As this Court said in that case:

> "The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. * * * The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable."

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*"Sec. 15. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof the Commission may, after hearing, make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order * * *." (36 Stat. L. 551.)

The reports of the Commission indicate that under the former Act it had undertaken to prescribe divisions of rates on individual commodities in consideration of the circumstances surrounding the transportation of these particular commodities, similar to those considered here.

Stonega Coke & Coal Co. v. *L. & N. R. R. Co.*, 39 I. C. C. 523 (1916—coal and coke);
Cape Girardeau Portland Cement Co. v. *St. L. & S. F. R. R. Co.*, 47 I. C. C. 204 (1917—cement).

Considering the purpose of the Transportation Act, it is difficult to conceive that it was intended thereby to curtail the powers of the Commission to prescribe divisions of individual rates. As the Court said in the *Brimstone* case:

> "Section 15 (6) should be construed in the light of the recognized difficulties."

Authority to prescribe the division of rates solely in the light of the facts previously considered by it plainly would not enable the Commission to take care of weak roads nor to accomplish the purposes intended by the Transportation Act. For this reason Congress enacted Section 15 (6) in the language that it did (*New England Divisions Case, supra*). It is to be inferred that its purpose was not to narrow the authority of the Commission but to make it clear that in order to carry out the broad purposes of the Transportation Act, the Commission might readjust divisions of joint rates, not only on the grounds previously considered by it but also in the light of other and additional considerations which it specified when this should be necessary "for distributing the funds expected to be raised by the new rate-fixing sections".

Summarizing this point, we submit that if proper weight is given to the words "due consideration" as used in Section 15 (6), the statute requires evidence to be before the Commission as to the factors specified only to the extent that such evidence may be pertinent to the issue to be decided and that the evidence before the Commission on the original hearing satisfied this requirement, the proceeding involving the division of the rate on a single commodity only and the record containing evidence as to each of the specified factors with reference to the transportation of silk.

POINT II.

Since the Commission, in making its determination and order of November 5, 1927, complied with the requirements of Section 15 (6) with respect to the matters to be considered by it, its decision and order constituted a valid determination of the future just, reasonable and equitable division to be received by the Hoboken, and its order was a valid order in so far as it fixed the division to be received by that company on and after thirty days from its date, or December 5, 1927.

The second ground upon which the lower court held the Commission's order of November 5, 1927 invalid was that the Commission while prescribing the reasonable division for the future, also attempted to make its order relate back to August 6, 1926, the date of the filing of the Hoboken's complaint with the Commission. The Court below appears to have held that on this ground, as well as because

of the lack of evidence, the order was void in its entirety (R. 41).

We submit that although the retroactive feature of the order was void, the order and the decision constituted a valid determination of the division to be received by the Hoboken for the future and that it was therefore within the inherent authority of the Commission subsequently to correct its order of November 5, 1927 to read as it should have read originally, to give effect to its determination and speak only as to the future.

Had the appellees, immediately after the issuance of the Commission's first order, sought to have it enjoined, it is submitted that a court should properly have enjoined the enforcement of the order only in so far as it related to past shipments. It has been held that where a portion of an order of the Commission is valid and a portion is invalid, and the invalidity results from an error of law, a court will enjoin the invalid portion but will not enjoin or may indeed enforce the valid part of the order.

Int. Com. Comm. v. *Diffenbaugh*, 222 U. S. 42, 49.
Chicago & A. R. Co. v. *Interstate Commerce Commission*, 173 Fed. 930 (reversed on other grounds in *Interstate Comm. Comm.* v. *Ill. Cent. R. R.*, 215 U. S. 452).

In *Chicago, M., St. Paul & P. R. Co.* v. *United States*, 33 Fed. (2d) 582 (D. C. N. D. Illinois) the court at page 589 said:

> "Congress, however, conferred upon the court jurisdiction to enjoin or set aside so much of an order as is invalid. The statute (28 U. S. C. A. Section 41 (28)) confers jurisdiction over all 'cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission'."

The Commission's report leaves no room for doubt that it intended to make a determination of the Hoboken's division for the future. All but the last paragraph of its first order speaks for the future (R. 213). There is nothing in the report indicating that its determination of a reasonable division for the future was conditioned upon or made only in consideration of the retroactive portion of the order. The determination of the division for the future was the important feature. The provision in the order attempting to render it applicable retroactively to August 6, 1926 is contained in a separate paragraph of the order from that prescribing the division for the future, and is plainly severable.

We therefore submit that the court below erred in holding that because the Commission attempted to make its order applicable retroactively to shipments moving after August 6, 1926, its determination and order of November 5, 1927 were null and void as to the future.

At most the effect of the invalidity of the last paragraph of the order was to render the order in its original form one issued without a valid effective date specified therein. If this is so, then we submit, as the Commission itself determined (R. 20), that the order became operative on the earliest date on which it could lawfully have been made effective, which under Section 15 (2) of the Act (see Appendix) was thirty days from its issuance, or December 5, 1927.

No cases have been discovered relating specifically to orders of the Interstate Commerce Commission issued without an effective date. However, in view of the fact that the function of the Commission in prescribing rates for the future has been held to be legislative in character, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, and the

same has been held with respect to the action of the Commission in determining the division of joint rates, *Terminal Railroad Assn.* v. *U. S.*, 266 U. S. 17, 30; it would seem that a strong analogy to the present situation is found in the cases involving statutes and executive proclamations. It has been held that a statute which does not within itself specify its effective date takes effect on the earliest date on which the legislature could have made it effective within the authority possessed by it under the Constitution. Thus where no time is expressly fixed by a general statutory or constitutional provision, a statute containing no provision as to its effective date takes effect upon its passage, *Matthews* v. *Zane*, 7 Wheat. (U. S.) 164, 211. In *State ex rel.* v. *Milroy*, 88 Ohio 301, it appeared that the Constitution of the State contained a provision that with certain exceptions, no law passed by the General Assembly should go into effect until ninety days after it should have been filed by the Governor in the office of the Secretary of State. The statute in question contained no effective date, but it was contended that it came within one of the exceptions and therefore it became effective immediately. The Court held that it took effect ninety days after filing by the Governor. In *Ross* v. *New England Mortgage Security Co.*, 101 Ala. 362, it appeared that the Code provided:

> "No penal act shall take effect until thirty days after the adjournment of the General Assembly at which such act was passed, unless otherwise specifically provided in the act."

The statute in question contained no provision as to its effective date and it was held that it took effect thirty days after the Assembly adjourned.

See also:

Payne v. *Graham*, 118 Me. 251;
Savage v. *State*, 18 Ala. App. 299;
In re General Appropriation Bill, 16 Colo. 539;
State v. *Hecker*, 109 Or. 520, 221 Pac. 808;
Simpson v. *Paddock*, 195 Mich. 581, 161 N. W. 898.

It is accordingly submitted that the court below erred in enjoining and annulling the order of November 5, 1927 in its entirety, and that it should have held that the Commission's decision and order constituted a valid determination of the division to be received by the Hoboken on and after December 5, 1927.

POINT III.

The Commission in making its order of May 7, 1929, fully complied with the requirements of Section 15 (6) of the Interstate Commerce Act as to the matters to be considered by it, and this order was amply supported by substantial evidence including sufficient evidence as to the matters referred to in said section.

It is unnecessary to argue this point, since it was the view of the lower court that when, on May 7, 1929, the Commission after a further hearing came to issue its second order, it had before it sufficient evidence to satisfy the requirements of Section 15 (6). It was apparently conceded by the appellees that the evidence taken upon the further hearing supplied any deficiencies which there may have been in the original record, and it appears from the opinion of the court below that its decision that the order of May 7, 1929 should be annulled was not predicated upon

an insufficiency of evidence but upon other grounds now to be discussed (R. 43).

POINT IV.

The Commission's order of May 7, 1929 properly amended its former order of November 5, 1927, so as to make the latter order effective December 5, 1927, instead of August 6, 1926.

Referring to the second order, the lower court in its opinion said (R. 43):

> "This order, as we view it, based upon the hearing which preceded it, might have fulfilled the intent of its makers, but for its retroactive features."

and again (R. 43):

> "We thus have presented a situation wherein an order, which by reason of its evidential background might, irrespective of all other considerations, have accomplished its purpose for the future, yet saddled with a proviso that its terms should become effective as of a date long preceding the taking of the testimony necessary for its being, and harking back to and attempting to revitalize a prior order which, builded on a faulty groundwork, was altogether null and void.
>
> It appears to us that the insertion of this retroactive provision has served to nullify and make void the Commission's second order of May 7, 1929."

It will be seen that the lower court's conclusion that the second order was invalid had for its premise the Court's opinion that the first order was void because of the insufficiency of the evidence on the original hearing. Whether,

if the premise was correct, the lower court was also correct in its conclusion as to the validity of the second order will be considered under the next point. But if, as we have contended, there was ample evidence on the first hearing to sustain the Commission's first order, and the Commission's first decision and order constituted a valid determination of the division to be received by the Hoboken for the period beginning 30 days after its date, then we submit that an entirely different question is presented, and that to hold the order of May 7, 1929 void as a retroactive order is to disregard the character of the proceedings.

The order of May 7, 1929, in so far as it was a retroactive order, was not an original order but by its very terms was an order correcting and amending its original order to read as the said order should have read when originally issued. We submit that it was clearly within the power of the Commission thus to correct its original order, and that such an order does not come within the language of the statute nor the principle announced by this Court in the *Brimstone* case rendering invalid an attempt by the Commission to give retroactive effect to an order prescribing divisions.

Section 17 of the Interstate Commeree Act (41 Stat. L. 492) provides:

> "(1) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

Section 16 (a) of the Interstate Commerce Act (34 Stat. L. 592) authorizes the Commission to grant rehearings and provides:

"if, in its judgment, after such rehearing and the

consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change or modify the same accordingly."

Section 16 (a) also provides that no application for rehearing

> "shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission."

Section 15 (2) likewise contemplates that the Commission may modify its orders, this section providing that its orders other than orders for the payment of money shall continue in force until its further order or for a specified period of time "unless the same shall be suspended or modified or set aside by the Commission."

These provisions relate to orders of the Commission in general and contain no language excepting orders as to divisions from their application.

The Commission's order reopening this case for rehearing did not contain a "special order" setting aside or suspending its order of November 5, 1927 (R. 214). This order therefore in so far as it was valid, remained in effect, and the Commission's determination continued to constitute a determination of the future division to be currently received by the Hoboken.

On the rehearing the Commission was convinced of the correctness of its previous determination and order prescribing the amount of the division to be received by the Hoboken, and therefore did not reverse, change, or

modify its original order in this respect. It recognized, however, that it had erred as a matter of law in providing that its original order should take effect as of August 6, 1926, and that the effective date of the original order should have been the earliest date upon which the order could have become effective under the terms of the Act, namely, December 5, 1927. It accordingly found that its original order should be corrected to provide that it should take effect on this date (R. 350, 351). Its order was therefore not in the terms of a new order but of an order correcting and modifying the previous order (R. 355) and, we submit, came within its authority under the provisions of the Act just quoted.

L. & N. R. Co. v. *Sloss-Sheffield Co.*, 269 U. S. 217; *Pennsylvania R. Co.* v. *United States*, 288 Fed. 88.

The argument that the second order was invalid as a retroactive order is based upon the language of Section 15 (6), but we submit that there is nothing in this language limiting the power of the Commission on a rehearing to correct an original order, or providing that every order fixing divisions which operates in any respect retroactively is invalid. The provision of this section as construed by this Court in the *Brimstone* case limits the power of the Commission to require a readjustment of divisions for the period between the time of the filing of the complaint and the announcement of the Commission's decision to instances where the Commission has itself prescribed the rate to be divided, but it does not take orders fixing divisions out of the general provisions of the Act nor provide that where the Commission has made a determination of a reasonable division and has made an order designed to enforce com-

pliance with the Commission's determination which is erroneous in form, such an order may not thereafter be corrected.

Moreover, the considerations which this Court in the *Brimstone* case outlined as reasons for limiting the authority of the Commission to compel a retroactive readjustment of divisions for a period prior to a hearing, do not apply to the period after a hearing has been held, after the Commission has considered the evidence, has found that the law is being violated and has announced its decision. Indeed, the second order was expressly designed by the Commission to make the first order conform to the views of this Court expressed in the *Brimstone* case.

The important consideration here is that the Commission's determination had been made and announced. The appellees and their connections were violating the law in not allowing a reasonable division to the Hoboken. The order was designed to compel compliance with the law and obedience to the Commission's determination. The error sought to be corrected by the order of May 7, 1929 was an error in the form of the order and not in the substance of the Commission's determination, and this error did not affect the fact that the appellees and their connections were violating the law which required them to accord to the Hoboken a just and reasonable division. Under these circumstances, we submit that it was error to hold that the Commission, after the rehearing, was without power by its order of May 7, 1929 to correct its order of November 5, 1927 to make that order read as it should have read when originally issued.

POINT V.

The order of May 7, 1929 was a valid order for the future.

If, contrary to the foregoing argument, this Court holds that the Commission was without power by its order of May 7, 1929, to correct its original orders and that the order of May 7, 1929 was invalid in so far as it attempted to do so, we submit that the order should nevertheless be held to have been a valid order with respect to the future, and that the court below erred in annulling and enjoining the order of May 7, 1929 in its entirety.

As has been pointed out, it is not contended and was not found by the court below that the evidence before the Commission as a result of the rehearing was insufficient to meet the requirements of Section 15 (6). The Commission therefore had the means of making a valid order for the future and for the reasons previously urged in Point II in support of a similar contention with respect to the first order, we submit that the order of May 7, 1929 should be held to be a valid order effective at least on and after June 5, 1929.

POINT VI.

The judgment of the court below should be reversed.

Respectfully submitted,

PARKER MCCOLLESTER,
Attorney for Appellant,
Hoboken Manufacturers'
Railroad Company.

APPENDIX.

The following portions of the Interstate Commerce Act, in addition to Section 15 (6), which has been quoted in full in the text, have been referred to:

Section 1 (4) (41 Stat. L. 474): "It shall be the duty of every common carrier subject to this Chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates, fares, and charges applicable thereto, and to provide reasonable facilities for operating through routes and to make reasonable rules and regulations with respect to the operation of through routes, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof as between the carriers subject to this Chapter participating therein which shall not unduly prefer or prejudice any of such participating carriers."

Section 15 (2) (41 Stat. L. 484): "Except as otherwise provided in this Chapter, all orders of the Commission other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Section 16 (a) (34 Stat. L. 592): "After a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein and it shall be lawful for

the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order."

Section 17 (1) (41 Stat. L. 492): "The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. The Commission shall have an official seal, which shall be judicially noticed. Any member of the Commission may administer oaths and affirmations and sign subpoenas. A majority of the Commission shall constitute a quorum for the transaction of business, except as may be otherwise herein provided, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. The Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, or before any division of the Com-

mission, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before the Commission or any division thereof and be heard in person or by attorney. Every vote and official act of the Commission, or of any division thereof, shall be entered of record, and its proceedings shall be public upon the request of any party interested."

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No. 33.

IN THE

Supreme Court of the United States

OCTOBER TERM 1931.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY, Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al., Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

HENRY S. DRINKER, JR.,
Attorney for Appellees.

No. 33.

In the Supreme Court of the United States.

OCTOBER TERM, 1931.

United States of America, Interstate Commerce Commission and Hoboken Manufacturers' Railroad Company, Appellants,

v.

The Baltimore & Ohio Railroad Company, et al, *Appellees.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR APPELLEES.

STATEMENT OF FACTS.

This proceeding involves the validity of the order of Interstate Commerce Commission, issued May 7, 1929, made retroactive to November 5, 1927, increasing from cents to 22 cents per 100 lbs. the division of Hoboken Manufacturers Railroad on raw silk, moved on through from the Pacific coast.

Hoboken Manufacturers Railroad Company, on whose tion the Commission made the order in question, is a

terminal or switching road in Jersey City, connecting with the trunk line roads and delivering carload freight received from them to the plants of the respective consignees.

In support of its contention that it was entitled to a larger division of the through rate on silk than the 5¼ cents per 100 lbs. which it had agreed on with the Trunk Lines, Hoboken Railroad presented on the first hearing before the Commission (November 22, 1926) testimony as to the cost to it of the service performed, which testimony is summarized in complainant's Exhibit 2 (Rec., p. 191) and is made up of four items:—

Switching	3.73
Terminal Insurance	11.25
Policing	1.25
Unloading and Delivery	6.00
Total Cost	22.23 cents per 100 lbs.

From complainant's testimony, it appeared that the two principal items of cost (Terminal Insurance, 11¼ cents, and Unloading and Delivery, 6 cents) were made necessary by reason of an arrangement which the Hoboken Company had made with the United States Testing Company, whereby the latter company performed, as agent for the Hoboken Company, the service of unloading the silk and delivering it to the consignees. On September 1, 1926, the Testing Company, whose business consists in testing and classifying raw silk preparatory to manufacture, had moved its plant from New York and located it on the line of the Hoboken Railroad. In contemplation of such move it had entered into the arrangement with the Hoboken Company above referred to (see Rec., p. 279), whereby all raw silk consigned for delivery on the Hoboken Railroad should be delivered at the warehouse of the Testing Company (a movement over the Hoboken Railroad of about two city blocks, p. 71), the latter to act as the agent of the Hoboken in unloading, checking, storing and delivering the silk to the consignees. For this service the Hoboken Company

agreed to pay the Testing Company 6 cents per 100 lbs. The Testing Company thus secured the advantage of having all this business dropped in its lap instead of having to depend, as theretofore (p. 119), on the silk being brought to it for testing by the respective consignees.

The arrangement with the Testing Company, according to the contention of the Hoboken Company, also made necessary the additional insurance charge of 11¼ cents. Although the insurance policies provided by the transcontinental lines on this silk hold for 48 hours after the arrival of the car at destination, such policies provided that in case of shipments to points of destination "other than New York" the insurance should terminate immediately on discharge of the railroad car (p. 173). Accordingly, when the Testing Company, as the agent for the Hoboken Company, unloads the silk at its warehouse, the transcontinental insurance ends, and, according to the contention of the Hoboken Company, it is required to provide additional insurance pending delivery to the consignee, at a cost of 11¼ cents per 100 lbs.

These two items, the 6 cents paid the Testing Company for unloading and delivery, and the 11¼ cents additional insurance, aggregate 17¼ cents or ½ cent more than the additional 16¾ cents awarded the Hoboken Company by the Commission.

The Testing Company having a manifest interest that the Hoboken Railroad secure a division which would enable it to pay the Testing Company's charges together with the additional insurance which its removal from New York made necessary, intervened and presented testimony.

The testimony offered at the original hearing before the Commission by the Hoboken Company (O'Neal, p. 68, Baker, p. 99, and O'Brien, p. 103) and by the Testing Company (Douty, p. 109, and Brown, p. 121) was confined to the character of the service performed by them respectively in switching this silk for the two City blocks from the Erie Junction point to the Testing Company's plant, with the alleged cost thereof. No testimony was offered

by either Company as to the cost of the service performed by the trunk lines from whose portion of the through rate the Commission was asked to take the 16¾ cents awarded to the Hoboken Company, although from plaintiff's testimony it appeared that the service rendered in the transportation of silk was extraordinarily expensive. (p. 113). It merely appeared that the total through rate was $9.00 per 100 lbs., of which the carriers east of the Mississippi (on whom the Commission imposed the payment of the additional 16¾ cents to the Hoboken) received in the aggregate 27½% or $2.47½. This rate was admittedly not one which had been "established pursuant to a finding or order of the Commission." O'Neal, the Vice-President and General Manager of the Hoboken Company, gave his estimate of the cost of lighterage across New York Harbor, including floating, unloading and delivery, policing and insurance, as 31 cents per ton, at which figure he calculated the cost which would be incurred to the roads other than the New York Central, if this silk, instead of being delivered to the Hoboken Company, were lightered across to New York (Rec., p. 82). The Secretary of the Hoboken Chamber of Commerce testified (p. 132) that in his opinion, the Hoboken Company was "an essential factor in the commerce and industry of Hoboken."

The above comprised all the testimony offered by complainant at the original hearing.

The evidence at the first hearing on behalf of the respondents comprised two sections; that offered on behalf of the roads west of the Mississippi, and that on behalf of the Eastern lines. The former (Toll, p. 132, and Gillette, p. 138) was in support of the contention that any additional division awarded the Hoboken Company should be absorbed by the Eastern roads by reason of the established practice of dividing all through transcontinental rates at the River, each group bearing the originating or delivery costs incurred in its portion of the haul. Examples were detailed in which additional delivery charges at the Pacific end were absorbed solely by the Western lines. The rec-

nue statistics offered by Toll, wholly general in form and not detailed as to separate carriers, furnished no means whatever for determining whether the transportation of silk by these defendants was profitable or otherwise, nor whether these defendants were or were not prospering and efficiently operated.

The testimony for the Eastern roads was confined to attacking the necessity and reasonableness of the alleged items of expense to the Hoboken Company for policing, terminal insurance, and unloading and delivery. These items of cost, it was contended, were the result solely of the unnecessary injection of the Testing Company into the situation, which, while clearly to the advantage of the latter, and perhaps also to the benefit of the silk manufacturers, might not properly be made the occasion for saddling the trunk lines with an additional expense of 16¾ cents. The witnesses for the eastern roads (Burt, p. 147, Ward, p. 157 and Wilson, p. 168), also described the nature of the service performed by the Hoboken Company, and compared its division with the switching charges on other similar freight over other switching lines.

No testimony was presented by either side relative to the "efficiency with which the [eastern trunk line] carriers concerned are operated, *the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation,* and the importance to the public of the transportation services of such carriers," * * * or to "any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."[1]

On November 5, 1927, the Commission, pursuant to findings in an opinion based (as the Court below held) solely on the alleged need of additional revenue on the part of the Hoboken Railroad, and without any evidence or any

[1] Interstate Commerce Act, Sec. 15 (6).

finding or any reference whatever in the original opinion as to the cost of the service performed by the trunk lines, or their need of revenue, entered an order increasing the division of the Hoboken Company from 5¼ cents per 100 lbs. to 22 cents, which it directed the eastern lines to absorb in proportion to their existing divisions, without any contribution from the roads west of the River. This order the Commission made retroactive to August 6, 1926, the date of the filing of the complaint (213).

On February 20, 1928, this Court decided the case of Brimstone R. R. Co. *v.* U. S., 276 U. S. 104, holding void an order by the Commission changing divisions of through rates without evidence as to the matters prescribed in Section 15 (6) of the Act, and also stating that such a division order as to rates not theretofore prescribed by the Commission, might not, in view of the express terms of Section 15 (6), be made retroactive.

Accordingly, on May 14, 1928, the Commission, of its own motion, ordered a rehearing of the Hoboken case, which was held on July 13, 1928. At this rehearing, complainant undertook to make the record required in such a case by Section 15 (6), and introduced evidence intended to prove each of the items prescribed by the Statute (see Exs. 25-31),[2] and also introduced "tariffs and division sheets," "typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier," in the manner emphasized as necessary in the New England Divisions Case, 261 U. S. 184, 196, in U. S. *v.* Abilene & Southern Railway Co., 265 U. S. 274, 291, and in the Brimstone case, 276 U. S. 104, 117.

On this new record, the Commission on May 7, 1929, entered a new order, allowing the same 22 cent division to the Hoboken Company, but again making the order retroactive, this time to December 5, 1927 (thirty days after the date of the original order of November 5, 1927), in spite of the fact that the evidence necessary to sustain

[2] (Rec., pp. 326-339).

such order was not introduced into the record until long after such effective date (p. 355).

Commissioners Porter, Aitchison and McManamy disagreed with the majority on the ground that, even on the second Record, the evidence was too meagre to justify, under the Brimstone case, the conclusion that the eastern roads might "justly, reasonably and equitably," be required to bear the additional 16¾ cents awarded the Hoboken Company.

On February 4, 1930, the Commission made a further order, effective March 10, 1930, prescribing the same division for the future and confirming the orders of November 5, 1927, and May 7, 1929, with respect to shipments moving prior to March 10, 1930 (pp. 365-6).

On application to the statutory three-judge Court, the Commission's orders of November 5, 1927 and May 7, 1929, were annulled on the ground that the original order was invalid because made on a record which lacked the evidence specifically required by the Statute, and that the Commission, having obtained the requisite record subsequently, was powerless to revitalize the original order by a retroactive amendment thereof, made after the necessary testimony had been heard. From its examination of the evidence in the first record before the Commission the Court reached the following conclusion (p. 41):

> "The testimony offered at the hearing which preceded the original order of November 8, 1927, was narrow in its scope, and, as we view it, fell far short of a compliance with the terms of the act. It seems to have been based altogether, so far as the Hoboken Railroad's interests were concerned, upon the allegation that the railroad needed the additional revenue and without any reference to the services performed by the trunk lines, or their condition, efficiency, and need of revenue. In other words, its point of view was essentially parochial, rather than all-embracing, as contemplated in the statute."

Speaking of the order of May 7, 1929, the Court said:

> "In this order also was incorporated a retroactive provision, making its terms effective as of December 5, 1927, despite the fact that the evidence necessary to support such order did not come into existence until the effective date had long since passed" (p. 42).

SUMMARY OF ARGUMENT.

The function of the Commission, in prescribing the just and equitable proportions of a joint through rate to be received by the respective connecting carriers, parties thereto, can be exercised only after the Commission has ascertained, by competent testimony, the revenue needs and the cost and nature of the service performed by all of such carriers.

Section 15 (6) of the Interstate Commerce Act specifically precludes the ordering of retroactive divisions except only in the case of joint rates previously established by the Commission (which this was not) and specifically requires, in every case where divisions are altered, that the Commission shall give due consideration to each of five specified considerations, including the efficiency with which all the carriers concerned are operated and the amount of revenue necessary to each to meet necessary expenses.

The original hearing before the Commission, to the date of which it attempted to make the order complained of retroactive, contained no testimony on which a finding could be based either (*a*) as to whether the Appellees (the connecting carriers other than the Hoboken) were operating their respective roads as a whole at a profit or at a loss, or (*b*) as to whether the shares of the particular rate in question, received by such connecting carriers, were reasonable, barely remuneratory, or less than the cost of service.

The Commission was clearly without power to make its later order retroactive to a date when it had given no con-

sideration whatever to the essential factors required by the Act.

At the second hearing, both the Examiner for the Commission and counsel for the Hoboken Company clearly indicated their recognition that the original record was fatally defective under the rule laid down in the Brimstone case.

An analysis of the New England Divisions, Abilene and Brimstone cases, as applied to the present case, clearly sustains the decision of the Court below.

The grounds on which the Appellants attempt to distinguish these cases are fallacious. The items of testimony now relied on by them as sustaining the sufficiency of the original record are insufficient for that purpose and were not even alluded to by the Commission in connection with the issue of its second and retroactive order.

The decision of the Court below should be affirmed.

ARGUMENT.

Brief Review of the Provisions of the Act Authorizing the Commission to Prescribe the Relative Divisions of Joint Through Rates.

The fundamental purpose of the Interstate Commerce Act was to enforce, for the benefit of the public, the duties which the law imposed on common carriers in consideration of the special powers and privileges which the law accorded them. This Act was not designed to regulate the contractual relations of the carriers as among themselves and the provisions having this effect, which were later introduced, were a mere incident to the primary purpose of protecting the shippers.

The original Act of 1887 (24 Stat. at L. 379) gave the Commission no power to require the carriers to agree on joint through rates or to prescribe the proportions in which they should divide a rate voluntarily agreed on between them. As the administration of the Act developed, it was found that the furtherance of efficient transportation required, in proper cases, the establishment of joint through routes and

rates between connecting carriers, and by the Amendment of 1906 (34 Stat. at L. 584, 589, Sec. 15) the Commission was given power to establish maximum through rates and joint rates and to prescribe the divisions thereof.

Manifestly, if the Commission was to impose a total joint through rate on two or more connecting lines, it was necessary to provide machinery for fixing the division thereof between the participants in case they could not agree. Such division, under a provision inserted by the Amendment of 1910 (36 Stat. at L. 539, 551) was left in the first instance to voluntary adjustment by the carriers, parties to the joint through rate so established, the Commission being given power to prescribe the "just and reasonable proportion of such joint rate to be received by each carrier party thereto" only after the carriers had failed to "agree among themselves upon the apportionment or division thereof."

Here, it will be noted, the function of the Commission was not to decide whether one of the carriers was of itself intrinsically entitled to more or less, but what was "the just and reasonable *proportion* * * * to be received by *each carrier* party thereto" out of the total rate prescribed by the Commission, which could be determined only by a consideration of the *relative* service and cost of all the participants and could obviously not be determined merely by considering the needs and service of but one of them.

The Amendment of 1920 expanded the provisions of Section 15 to its present form,[4] but preserved both its

[4] Section 15 (6)—Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation contemplated by such joint rates, fares, or charges, are unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto, it shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers parties thereto, in cases where the joint rate, fare, or charge [illegible] the Commission shall find that the [illegible] are found by it to be [illegible]

purpose and its basic limitations. The Commission was specifically directed, in prescribing the relative divisions of joint through rates, to give consideration to the relative service and revenue needs of *all* the participating carriers. It was authorized to make retroactive division orders only in the case of joint through rates which the Commission itself had prescribed, where obviously the Commission had already had before it all the factors relevant to the entire haul over all the participating roads.

There is no indication in the Act of any purpose to readjust, retroactively, the divisions voluntarily agreed on by two connecting lines, merely because one of them had thus undertaken to perform a service which cost it more than it had agreed to receive. Such carrier would be at liberty at any time to withdraw from the joint rate and to fix such local rate as it saw fit for its own service. If the interest of the public then required a joint through rate, the Commission was empowered to investigate the entire situation, prescribe a joint through rate, and fix the "just, reasonable and equitable divisions thereof."

The Commission was without power to make the order of May 7, 1929, retroactive to a date prior to findings by the Commission, based on competent testimony, as to the considerations prescribed by Section 15 (6).

Section 15 (6) of the Interstate Commerce Act, in defining the conditions under which the Commission is

reasonable and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their actual operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and shall not permit any participating carrier to use any unreasonable, or destructive rate, and any other fact or circumstance which would ordinarily, without regard to the situation of such carrier, be taken into consideration in determining the reasonableness of the joint rate, fare or charge (41 Stat. at L. 484, 489).

empowered to prescribe the division of joint rates between connecting carriers, places two express limitations on the power of the Commission.

(1) Where the joint rate under consideration is not one which has been established pursuant to a finding or order of the Commission, it may not make retroactive its order prescribing the divisions of such joint rate.

(2) In every case, in prescribing such divisions, the Commission is bound to give consideration to the efficiency with which *the carriers concerned* are operated, the amount of revenue required to pay their *respective* operating expenses, taxes and a fair return on their railway property held for and used in the service of transportation and the importance to the public of the transportation services *of such carriers*, etc.

Both of these limitations were ignored by the Commission in its original order of November 5, 1927.

(1) The Commission made such division order retroactive to the time of the filing of the complaint, although the joint rates in question were not rates which had been established by the Commission.

(2) Without any evidence as to the service performed by the connecting carriers, their operating expenses or their need of revenue to secure operating efficiency, the Commission abstracted a part of their share of the joint rate (not of itself found to be unreasonably high) and gave such part to the Hoboken Company, merely because the latter appeared to be in need of more revenue.

The first of these errors the Commission purported to correct, after the rehearing, by making its new order effective thirty days after the date of its original order; the second error the Commission, as well as the Hoboken Company, also recognized, by taking elaborate testimony at the rehearing on all the matters prescribed by Section 15 (6) which had been omitted from the first record. Instead, however, of making its new order speak from a date thirty days after its findings, based on the new record containing the necessary testimony, the Commission made

it still retroactive, by dating it back to thirty days after the date of the first order, at which date the Commission had obviously heard and considered none of the essential testimony, and had made no findings based thereon evidencing its "due consideration" thereof.

Section 15 (6) requires that, in prescribing and determining the divisions of joint rates, each of the specified matters shall be given due consideration by the Commission, and that no retroactive order be made except in cases where the joint rate in question is one which the Commission itself has established by a prior order. Clearly to such "due consideration" it is essential first, that the Commission have before it, for consideration, competent testimony on the specified subjects; second, that such due consideration be evidenced by the making of findings based on the testimony so considered.[4]

At the Second Hearing both the Commission's Examiner and Counsel for the Hoboken Company clearly Indicated their Recognition that the Original Record was Defective.

The original record, on which was based the order of November 5, 1927, was restricted to testimony as to the nature of the service performed by the Hoboken Company, the cost to it of performing such service and its need of additional revenue. The service and revenue requirements of the connecting lines were wholly ignored. While such conclusion will be apparent, from a reading of the original record (pp. 63-216) it is conveniently demonstrable from the statements by the Examiner and by counsel for Hoboken Company at the second hearing. They all clearly recognized that the original record was fatally defective in failing to include competent testimony on the matters prescribed by Section 15 (6), and that the sole purpose of the rehearing ordered by the Commission after the Brim-

[4] See Chicago Junction Case, 264 U. S. 258, 265, quoted *infra*, note 6, p. 30.

stone decision, was to hear the necessary additional testimony.

Except for this no rehearing was necessary.

If all that was wrong was that the order of November 5, 1927, had been made retroactive to August 6, 1926, this could have been corrected by the Commission without any rehearing and without any additional evidence.

As has been stated, the occasion of the rehearing of this case, which the Commission ordered of its own motion on May 14, 1928, was the decision by this Court in Brimstone R. R. Co. *v.* U. S., 276 U. S. 104.[5] This decision annulled an order of the Commission modifying existing divisions between the Brimstone Railroad and its connecting lines, first, because such order had been based solely on evidence relative to the service cost and revenue requirements of the Brimstone, and without adequate testimony as to those of the connecting lines, and, second, because the order was made retroactive to the date of the original complaint, the joint rate in question not being one which had previously been established by order of the Commission.

At the opening of the rehearing in the case at bar, the Commission's Examiner made the following statement as to the purpose of the rehearing (pp. 216-217):—

> "EXAMINER SMITH:
>
> "Gentlemen, as I interpret the Commission's action in reopening this proceeding on its own motion for this rehearing, it is *my duty to obtain such a clean, clear record, that even the wayfaring man—though an attorney—need not err therein,* and, before all, is or is not this a case 'where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission'?
>
> "I understand that the joint rate on silk from Pacific Coast points to Hoboken, N. J., $9 per 100 pounds, was not so established; that it was, and is,

[5] This decision is reviewed at length, *infra*, pp. 25-28.

a carrier-made rate; and that the Commission's jurisdiction is fully described and conferred in Section 15 of the Act, paragraph (6) thereof, in the following terms:

"'(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable and equitable divisions thereof to be received by the several carriers. * * * *In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers and also whether any particular participating carrier is an originating intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.*'"

Pages 218 to 224 of the record at rehearing cover an attempt by the Examiner to summarize the testimony on the original record. It is significant that there is no reference whatever to the considerations presented by Section 15 (6) as applied to the connecting lines.

Again on page 229, after discussing with counsel certain facts and contentions which, with more or less success, he

thus endeavored to have stipulated, Examiner Smith made the following significant statement:—

> "EXAMINER SMITH:—In and to the extent now shown by your agreements, or exceptions, to the above statements made by me, the record ought to be nearly clear. As I see our work for the day—and this, gentlemen, is not to limit your procedure—merely my guess—we may direct our attention to:
>
> *"The matters required by the act;* and then to the measure of the divisions to be accorded complainant. * * *"

On page 256, Mr. L. D. Hawkins, a witness for complainant, being on the stand, Mr. McCollester, counsel for the Hoboken Company, made the following statement:—

> "MR. MCCOLLESTER:—Mr. Examiner, I should like to suggest, for the purpose of shortening the record, *and at the same time meeting the requirements of the law,* that so far as the stipulation may be binding upon the Commission, the complainants and defendants stipulate that they are each of them respectively efficiently operated, and are of importance to the public, and of such importance that their continued operation is in the public interest. We will stipulate that for the defendants if they will do the same for us.
>
> "MR. WESTLAKE:—It is so stipulated for those whom I represent.
>
> "MR. PIERCE:—And for the others.
>
> "EXAMINER SMITH:—And that is stipulated as a matter of fact as well as a matter of law."

The foregoing statements by the Examiner and by counsel for the complainant make it clear that the purpose and the recognized necessity for the rehearing was to remedy the defect in the original record, recognized after the announcement of the Commission's order in the Brimstone case for an exactly similar defect, by including competent testimony on the matters prescribed by Section 15 (6) (which

quirements the Examiner quoted in full at the opening of the rehearing), after due consideration of which and findings based thereon the Commission might then make a valid order, effective for the future. As heretofore stated, if the only defect recognized in the original order was its having been made retroactive, this could readily have been corrected without the necessity of any rehearing.

At the rehearing, complainant and the Examiner, between them, by stipulation with defendants or by competent testimony, endeavored to supply the previously absent items of proof. See especially Hawkins Exs. 25-30, pp. 325-338.

Both the Examiner and complainant's counsel having thus clearly regarded the prior record as defective because lacking testimony in the matters required by Section 15 (6) (enumerated at length by the Examiner at the beginning of the rehearing), counsel now contend that the original record did in fact contain adequate testimony on all these points. Were such the case, the rehearing was obviously unnecessary, since the Commission could, without hearing further testimony, have modified its order to eliminate the retroactive feature.

The Testimony from the Original Record now Relied on by Appellants to Support the Retroactive Order of May 7, 1929, falls far short of the Requirements of the Act.

In support of their present contention that the original record contained ample testimony to support findings on all the matters required by Section 15 (6), Appellants quote voluminous testimony relative to the character and cost of the service *performed by the Hoboken Company*, all of which is wholly besides the mark. What is lacking is testimony as to the character and cost of the service by the other Eastern carriers. The only items of such testimony relied on by Appellants are two, each of which can readily be demonstrated to be insufficient.

In support of his contention that any increased award to the Hoboken road be borne by the Eastern roads, Mr. Toll,

the representative of the Western roads, produced a table showing the relative gross and net *total* revenues of the Eastern, Southern and Western roads, the percentage of return of the roads in the Central Eastern region for 1925 and 1926 being 4.86% and 5.24% (Rec., p. 199). It is utterly impossible from this table to determine whether these defendants or any of them are operating their roads profitably or unprofitably, efficiently or otherwise. Nor would it have the slightest bearing on the determination as to whether 2.42½¢ per 100 lbs. was or was not an unreasonable amount for these defendants to receive for hauling silk in baggage cars at 100 miles per hour under special guard and insurance from the Mississippi River to Hoboken.

The second item of proof relied on, and now for the first time particularly stressed by both counsel is the testimony of complainant's superintendent O'Neal, which Appellants characterize as showing "that the Trunk Lines would benefit financially by the arrangement with the Hoboken, because Hoboken's service was a substitute for a service which had cost the Trunk Lines 31 cents per 100 lbs." (Brief for Interveners, p. 23.)

What O'Neal testified (pp. 79-82) was that when silk was to be delivered in New York City, the carriers *other than the New York Central*, who had no tracks into New York, were compelled to lighter it over from the Jersey side at a cost to these carriers which O'Neal "estimated"[4] at

[4] Doubtless one reason that this point has not heretofore been stressed is that, when O'Neal's testimony is examined, it will be found to be manifestly unreliable. It is built up on certain cost figures compiled by the Port Authority. Aside from how accurate may be the result, it is well recognized that the cost of lighterage and floatage service in New York Harbor includes such service throughout the entire hasbor area. Such service is inclusive of lighterage and floatage service performed on the Jersey side, as well as between the Jersey water front and Manhattan and Long Island. Obviously in a group adjustment it is improper to attempt to single out but one phase of service and assign to it an alleged cost calculated on the total service performed throughout the entire group area. The alleged saving effected by stopping the silk shipments of the Testing Company at Hoboken, instead of floating the cars across to Manhattan, would not in any event be the cost of water service measured throughout the entire New York Harbor, but in reality would represent a very small proportion of such cost.

31 cents per 100 [illegible] however, did not purport to represent any saving in the cost of delivery of silk in connection with shipments to points on the Hoboken road, but resulted, if at all, because the Testing Company moved its plant to a point within the rate group nearer to the point of origin. If the Testing Company had moved its plant to Philadelphia instead of to Hoboken, its move would have enabled the Pennsylvania and the Baltimore & Ohio to save the entire cost of the haul from Philadelphia to Hoboken, in addition to the supposed 31 cents, and would have added to the cost of the New York Central the expense of the haul from Hoboken to Philadelphia, as well as the cost of floatage from Manhattan to Hoboken. This, however, would have had no bearing on the reasonableness of the division between the Hoboken and these roads on silk actually hauled to Hoboken. Conversely, if the Hoboken railroad were located in Atlantic City and the Testing Company had moved there from Hoboken, the additional cost to the Trunk Lines in hauling the silk to Atlantic City would in no way tend to lessen the proper division to the terminal road. A switching road located at a junction at the near edge of a rate group cannot justify a higher division of the joint rate merely by showing that certain shippers, who previously got the long haul at the group rate, have now moved to points on the switching road nearer to the point of origin than formerly, thus saving the carriers the expense of the long haul. If such were true, the division of a switching road at the far end of the group would be cut down when it appeared that shippers had moved there from the near end, thus increasing the cost to the Trunk Lines in connection with their traffic.

Following this argument, if the Hoboken road were at Albany, it should get perhaps 40 cents for the same service. If it were at Atlantic City 5¼ cents might be excessive.

Also, the supposed 31 cents saving would admittedly not occur when the connecting line is the New York Central whose actual rail terminus is in New York City.

This supposed 31 cent saving to defendants, which was

not referred to [redacted] the Court below and which is now for the first time stressed on behalf of the Hoboken road, has no bearing whatever on the reasonableness of the relative shares of this joint rate receivable by the participating carriers.

Analysis of Decisions by this Court in the New England Divisions, Abilene and Brimstone Cases.

The question of law answered by the Court below in the negative and now brought to this Court for decision, is, therefore, whether the Commission, on the basis of additional testimony given at the rehearing, might thereby validate its prior order, as of a date 30 days after such original order, in spite of the absence of such necessary testimony, or of any finding based thereon, at the date of the entry of the order so validated.

It is submitted that such action by the Commission cannot be sustained without ignoring the express provisions of Section 15 (6) which prescribes the specific matters to which the Commission must give consideration prior to making a valid rate division order, and precludes the making of such an order retroactive except in the case of joint rates previously established pursuant to a finding and order of the Commission. Otherwise, it would follow that, whenever a complaint was filed asking for a modification of existing divisions of joint rates not established by order of the Commission, the latter could readily evade the prohibition against the retroactive order by issuing an early order prescribing the requested divisions, after a perfunctory hearing, which order, while presently ineffective, could be validated as of a date 30 days after its entry, if the Commission on subsequent hearing and consideration of competent testimony relative to the matters prescribed by the Act, concluded that the order so entered was justified by the subsequently taken testimony.

Three recent decisions by this Court so directly control the decision of the present case, as to make a consideration of other decisions unnecessary.

The first of them is the *New England Divisions Case*, 261 U. S. 184, which involved the divisions of all joint rates as between the New England roads and their connections. The original report by the Commission merely recommended an adjustment of the divisions (62 I. C. C. 513). Later, when no such adjustment was forthcoming, the Commission, after reargument, issued an order fixing such divisions. This order the Commission did not, however, attempt to make retroactive to the date of its original decision, but made the new order effective merely from thirty days after its own later date (66 I. C. C. 196). Both the District Court and this Court, in upholding such order by the Commission, prescribing increased divisions to the New England Roads, specifically found that the record before the Commission, on which the order was based, contained ample testimony to support it. Mr. Justice Brandeis said (p. 203):—

> "*Sixth.*—It is contended that the order is void, because it is unsupported by evidence. An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. I. C. C. *v.* Union Pacific R. R. Co., 222 U. S. 541, 547; Florida East Coast Rwy. Co. *v.* U. S., 234 U. S. 167. The rule must, of course, be the same in respect to an order fixing divisions. * * * That the evidence was ample to support the order made, is shown in the opinion of the lower Court, 282 Fed. 306, 308, 309, and in the reports of the Commission."

In the New England case this Court also proceeded on the theory (see p. 196) that the additional amounts awarded the New England lines were not abstracted from the connecting roads, but were obtained by the increase of 40% in the present rates which the Commission had ordered.

The Court (261 U. S. 184, 196) treated the action of the Commission as equivalent to what it would have been by a single order which had raised joint rates 40%,

and in the same order had declared that 90% of the whole increase in the joint rates should go to the New England lines in addition to what they would receive under existing conditions.

While in this case it was recognized that it was not necessary for the Commission, in case of a joint rate shared by a great number of connecting lines, to consider separately and at length testimony as to the service, cost and revenue requirements of each connecting road, nevertheless it was made clear that in such event, even where no part of the share of the connecting roads was taken from them for the benefit of the line needing the revenue, an order modifying existing divisions must be "based upon evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier" (p. 196). See also 282 Fed. at p. 309.

This essential requirement has been emphasized in the discussion of the New England case, both in the Abilene (265 U. S. 274, 291) and in the Brimstone (276 U. S. 104, 117) decisions.

In the case at bar, there was no attempt, on the original record, to present any rate or division sheets for comparison with those here involved or any other testimony from which a finding might be made as to whether the silk traffic in question was carried on by these defendants at a profit or a loss. It merely appeared (from plaintiff's testimony) that the silk was "hurried across the continent at a very high rate of speed and at very large expense" (p. 113). There was no evidence from which the reasonableness of the $2.42¼ division of the other eastern lines could be determined; nor was there any testimony from which a conclusion could be reached that the proportions of the rate to which the Hoboken Company had agreed when it joined in filing it, were relatively "unjust, unreasonable or inequitable."

U. S. v. Abilene & Southern Railway Co., 265 U. S. [illegible] was an appeal from the Federal Court of Kansas,

enjoining the enforcement of an order of the Commission made pursuant to Section 15 (6) and relating to the division of interstate joint rates, within the United States, between the Kansas City, Mexico & Orient system and thirteen connecting carriers. The order provided that on all such traffic the existing divisions of these connecting carriers should be reduced by fixed percentages, and that the Orient should receive the amounts so taken from the connections (73 I. C. C. 319, 329).

The finding of the Commission that the Orient was in need of additional revenue and that its share of the joint rates in question was unremunerative, was apparently based on competent evidence in the record before the Commission, but the conclusion that the increased division to the Orient might properly be taken from the shares of the connecting lines was *based on the annual reports* of such lines in the files of the Commission, which it considered without introducing them into the record.

This Court, affirming the Court below, held that the Commission may not thus base a necessary finding on data not offered in evidence, though contained in its files, however authentic such data may be.

The Court on page 284 summarizes the matters prescribed by Section 15 (6) as necessarily proved in this particular case to authorize the Commission to make a valid order modifying the divisions of joint rates, and points out that the annual reports had been used by the Commission as evidence of facts deemed by it thus "necessary to prove," and not merely "as a means of verifying facts of which the Commission, like a Court, takes judicial notice" (p. 287).

> "The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made." * * *

"The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument and by their acquiescing in the suggestion that the presentation of a tentative report by the Examiner be omitted * * * (p. 289).

"The order must, therefore, be held *void*" (p. 290).

The Court also apparently sustained the carriers' Fifth objection to the order, which objection was based on the fact that the record before the Commission did not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates are divided, or any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates, pointing out that tariffs and divisions should be in the record which, in the opinion of the Commission, are typical in character and ample in quantity to justify the finding made in respect to each division of each rate of every carrier, as was done in the New England Divisions case.[7]

Both grounds for the above decision are directly applicable in the case at bar. The original record before the

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[7] In the Abilene case the Court below (288 Fed. 102) made the following significant statements in the course of the opinion:—

"The Transportation Act discloses no intention to vest the Commission with power to relieve the necessities of weaker lines by imposing the burden upon its connections, simply because they are able to bear it" (p. 113).

"In short, we find no facts in the record which sustain the order, except the broad proposition, amply supported by proof, that the Orient is not self sustaining and needs help; but we cannot assent that the Commission is empowered to compel prosperous roads, because they are prosperous, to contribute their services to the sustenance of weak roads, because they are weak" (p. 114).

The above would be strikingly applicable to the present case if, by the first record in the case at bar, it had appeared that the connecting lines were prosperous. The case at bar is even stronger against the validity of the order, since the record on which it was necessarily based lacked the essential evidence as to the prosperity or otherwise, of the roads from whom the Commission abstracted the 16½ cents for the benefit of the Hoboken Railroad.

Commission in the present case contained no data whatever on which might properly be based any finding as to the operating efficiency, the cost of service, the financial needs or the operating return of the carriers from whom was abstracted the 16¾ cents awarded the Hoboken, or any basis for a finding that the divisions of the rate on which they had voluntarily agreed were relatively "unjust, unreasonable, inequitable or unduly preferential or prejudicial" as between them so as to require that they might "justly, reasonably or equitably" be called on to surrender to the Hoboken such part of their revenue. Neither the original record before the Commission, nor the second record on rehearing, contained any tariffs or division sheets which might be said to be "typical in character" or "ample in quantity" to justify a finding in respect to the division of this particular rate among these carriers. If the Commission made any such determination and did not merely conclude that the Hoboken needed more money, such determination was based on what it knew or ascertained outside the present record.

The third case referred to is that which prompted the rehearing by the Commission of its own motion in the case at bar, *Brimstone R. R. Co.* v. *U. S.*, 276 U. S. 104, decided February 20, 1928. This was an appeal by the Brimstone Railroad from a decree of the Court below sustaining the order of the Commission, which order required the Brimstone road to surrender a part of its division of joint rates to its connecting lines.

The evidence before the Commission was directed solely to the excessiveness of the return to the Brimstone road, the contention being that this was in the nature of a rebate to the Union Sulphur Company, which owned all its capital stock and furnished more than 90% of its traffic (276 U. S. 111). This evidence is thus summarized on page 113 of the report:—

> "Testimony was taken relative to ownership and organization of the Brimstone Company; its relation

to Union Sulphur Company; its operating and financial condition, including dividends, surplus, and character of service performed; volume of road-building material carried for Parish purposes; establishment by United States Railroad Administration of divisions with connecting lines, with factors considered in connection therewith; comparison between the questioned divisions and those received by other lines in the same territory; also value of operating property, including cost of reproduction."

The Commission's order was made retroactive to the date of the filing of the complaint.

This Court thus states the two grounds on which the validity of the order was objected to (p. 109):—

"1. The Commission failed to investigate or determine the reasonableness or justness of the divisions, or whether they were unjust, unreasonable, inequitable, or unduly preferential or prejudicial, as between the carriers; also failed to consider whether the circumstances entitled one to a greater or less proportion than another of the joint rates, as commanded by Section 15 (6), Transportation Act, 1920. (41 Stat. c. 91, p. 456).

"2. The joint rates were agreed upon by the parties and not 'established pursuant to any finding or order' of the Commission, within Section 15 (6), Transportation Act, 1920. Consequently, the Commission had no power to require adjustments for any period prior to the final order."

In summarizing the prior general investigation by the Commission, which included the joint rates in question (on which the Commission based its contention that such rates were "established" by it, justifying a retroactive order) the Court pointed out that in such investigations "no studies were made or evidence taken concerning efficiency

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[58] 1 C. C. C. 220; 68 I. C. C. 676; 88 I. C. C. 62.

of Southern Pacific and Kansas Southern lines, amount of revenue required to pay their respective operating expenses, taxes, and fair return upon their property, or the public importance of services performed by them, or any other fact or circumstance (except as shown above) which ordinarily, without regard to the mileage haul, would entitle them to a greater or less proportion of the joint rate. Section 15 (6)" (p. 114).

On pages 115-116 the Court said:—

> "The Commission evidently undertook to deprive the Brimstone Company of receipts supposed to exceed a fair return on its property and award the same to connecting carriers without evidence tending to show they were in need or had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust, or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers.'
>
> "Counsel suggest that in addition to facts revealed by studies of the Brimstone Company's affairs, the Commission did consider existing division sheets of joint rates, volume and distribution of traffic, past division sheets, divisions accorded to the Brimstone Company by the Federal Director-General, also testimony showing competition controlled the agreed divisions. But the very definite command of Section 15 (6) required more than that."

The case at bar is stronger, for here there were no such division sheets for comparison.

The Court then discusses the New England Divisions and Abilene cases. Of the former it says (p. 116):—

> "Nothing in the opinion supports the view that the Commission may take something from one carrier merely because its net revenue appears unduly large and donate this to another demanding nothing and not in

need. Cost of service to one carrier is not the only factor to be considered in determining just divisions."

The Abilene case is thus summarized (p. 116-117):—

"In the second case the Commission undertook to modify existing divisions for the benefit of a weak road. It did not appear that any matters consideration of which was required by Section 15 (6) Transportation Act, 1920, had been ignored, but the evidence concerning some of these things had not been properly presented and therefore the order was annulled. It was there said: (284) 'Relative cost of service is not the only factor to be considered in determining just divisions' (291). 'The power conferred by Congress on the Commission is that of determining, in respect to each joint rate, what divisions will be just. Evidence of individual rates or divisions, said to be typical of all, affords a basis for a finding as to any one. But averages are apt to be misleading. It cannot be inferred that every existing division of every joint rate is unjust as between particular carriers, because the aggregate result of the movement of the traffic on joint rates appears to be unjust. These aggregate results should properly be taken into consideration by the Commission; but it was not proper to accept them as a substitute for typical evidence as to the individual joint rates and divisions. In the New England Divisions Case, tariffs and division sheets were introduced which, in the opinion of the Commission were typical in character, and ample in quantity, to justify the findings made in respect to each division of each rate of every carrier. A like course should have been pursued in the proceeding under review.'

"The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15 (6). And it must be annulled."

On the second point (the power to make the order retroactive to the date of the complaint) the Court held in the Brimstone case that the orders issued in the general investigations did not amount to the establishment of specific rates within the meaning of Section 15 (6) so as to bring the case within the exception permitting a retroactive division order.

The Brimstone case, while the converse of the case at bar, is controlling in principle. There it was held that the Commission is without power to take from one road receipts supposed to exceed a fair return and award them to connecting lines without evidence that the latter were in need of additional revenue or that the joint rates themselves were unfair or unjust or that the agreed divisions were "unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers."

In the case at bar the Commission was equally without justification, merely because the Hoboken Company was believed to require additional revenue, to abstract the required sum from the connecting lines "without evidence tending to show that they * * * had or would receive more or less than a fair return from agreed divisions, or that the joint rates themselves were unfair and unjust [because too low] or that the agreed divisions were 'unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers'" (see 276 U. S. 104, 115).

Again, to paraphrase the Court's summary of the basis of its prior decision in the New England Divisions Case (quoted *supra*, pp. 27-28):—

> Nothing in the opinion supports the view that the Commission may donate something to one carrier merely because its net revenue appears unduly small and take this from another not shown to be unduly affluent. Cost of service to one carrier is not the only factor to be considered in determining just divisions.

It will be noted that in the decisions by this Court above summarized, the Court holds that where the Commission

has issued an order without evidence before it necessary to support the same, such order is *void*.[9] Obviously, a void order cannot be vitalized as of its original date by virtue of evidence later introduced.

Appellants' Attempt to Distinguish the Foregoing Cases.

Appellants now attempt to distinguish the above cases on the ground that they involved general divisions of rates on all freight, while this is the first division case involving a rate on a single commodity. In the first place, however, the Brimstone case was primarily one involving the division of rates on sulphur from the Union Sulphur Company mines, since the tonnage of the Brimstone road (as its name indicates) was virtually restricted to products of the Union Sulphur Company, which furnished 90% of its traffic. The reason for the Commission's proceeding against the Brimstone road was that its large division was in the nature of a rebate, this referring obviously to the rate on sulphur which was paid by the Union Sulphur Company.

The Act, in requiring consideration by the Commission of the specified items of testimony makes no distinction between cases involving rates generally and those involving a single rate on a single commodity.

If it costs the Hoboken road more than $21.00 per car (5¼¢ per 100 lbs.) to switch these cars two blocks from

[9] See also Chicago Junction Case, 264 U. S. 258, 265, where this Court, in discussing an order of the Commission found to have been unsupported by necessary testimony said:—

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence *and the duty of deciding in accordance with it.* To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and *since such an order is void*, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

the Erie interchange point to the warehouse of the Testing Company, this might justify an additional charge to the shipper, but cannot of itself justify the abstraction of $67 per car from the amount received by the Eastern roads as their share for hauling the silk from the Mississippi to the junction with the Hoboken. There is no testimony whatever on which to base a finding that the share of this joint rate received by defendants is excessive, or that it constitutes more than a fair return for the exceptional service rendered. If (as must be assumed from the Hoboken's agreement to this share when the joint rate was voluntarily established) such share is but a reasonable return for the service rendered, or represents an equitable proportion of the total, no part of it can properly be abstracted merely to give the Hoboken road a reasonable return for its switching service. To do so would be robbing Peter to pay Paul.

Many through rates on specific commodities are unremunerative to the participating carriers. In the case of such a through rate, all the participants must share the loss in equitable proportions.

While doubtless the testimony proper to justify the modification of divisions on a single commodity might differ from that proper in a case involving rates generally, there is nothing in the Act to warrant the contention that its plain requirements are to be ignored in a case like the present. The record on which its order complained of was based contained nothing from which the reasonableness of the $2.42¼ could be determined. All that appeared was that the service was unusually expensive, involving high speed, special guards, and extraordinary insurance.

Appellants make the extraordinary contention that while the aggregate reasonableness or unreasonableness of an entire rate schedule can be determined, it is impossible to determine the reasonableness or unreasonableness of a rate on a single commodity. But this is just what the Commission has been doing dozens of times each week for

the last forty-four years. It was entirely possible for the Commission, on a proper record containing adequate testimony, to determine whether the share of this rate received by the eastern trunk lines was unreasonable, because out of line with other similar divisions; also to determine in what proportions the rate should fairly be divided. But neither determination could be reached merely on evidence of the facts at but one end of the haul and without knowing whether the total rate to be equitably divided was unusually profitable, barely compensatory, or forced down by competition to a point so low as to be unremunerative to all participants. It is obviously impossible to determine the fair, just, and equitable division of anything merely by ascertaining the needs of one participant, awarding to him sufficient to satisfy such needs, and giving to the others what is left.

It is further suggested in the brief of the United States that a hearing has been held and the carriers given an opportunity to present testimony that their share of the joint rate was not excessive, and that since they have failed to do so, it must be assumed that the facts are as complainant would have them. This contention not only ignores the express requirements of the Act, but is contrary to the practice in all rate cases. When a shipper sues to have an alleged excessive rate reduced, has it ever been held that the burden is on the carrier to show that its rate is not exorbitant merely because the carrier is presumably in a better position than the complainant to produce the proper testimony pro and con? On the contrary, it has been expressly held that even the shipper, for whose protection the Act was passed, has always the burden of proof, save only in the case of rates increased after 1910, the specification of which exception by Congress merely serves to emphasize the general rule. If a shipper, by proof that he cannot afford to pay more, may not throw on the carrier the burden of proving a rate reasonable, is it to be assumed that Congress intended a fellow-carrier to be more paternalistically protected?

That no such extraordinary exception is to be read into the law as applied to division cases is clear from the decision of this Court in the Abilene and Brimstone cases, holding that the evidence required by the Statute could not be supplied by the Commission's referring off the record to the carriers' annual reports, or by the Commission's general knowledge.

The gist of Appellants' present argument is that when a switching road shows that its service costs it more than its agreed division, it thereby throws on the connecting lines the burden of proving that the share receivable by them is also "confiscatory," and that unless they can sustain such burden they must give up to the switching road enough to make its share compensatory. The statute contains no basis for such a contention. The history of the Act, as well as common sense, sustains the contrary presumption that the divisions of a joint rate, agreed on by the participating carriers, are relatively just and reasonable.

Conclusion.

It is therefore respectfully submitted that the order of May 7, 1929, which purported to modify that of November 5, 1927, so as to make the latter effective December 5, 1927, was wholly void and was properly annulled by the Court below, whose judgment should be affirmed.

Respectfully submitted,

HENRY S. DRINKER, JR.,
Attorney for Appellee.

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CHARLES ELMO

IN THE

Supreme Court of the United States

OCTOBER TERM 1931

No. 33

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and HOBOKEN MANUFACTURERS' RAILROAD COMPANY,

Appellants,

against

THE BALTIMORE & OHIO RAILROAD COMPANY, *et al.*,

Appellees.

PETITION OF HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLANT, FOR REHEARING.

PARKER MCCOLLESTER,
Attorney for Hoboken Manufacturers' Railroad Company, Appellant.

was beyond the Commission's power to correct the first order in this respect by its second order, and that the second order was invalid in that it "undertook retrospectively to change an existing agreed rate." The decision disregards the effect of Sections 16 and 16 (a) of the Interstate Commerce Act and the nature of the second order.

(2) The Court should reconsider its decision that the first order failed to indicate when it should take effect, as required by Section 15, paragraph (2) of the Interstate Commerce Act; that "no future day was prescribed", and that "accordingly the order did not become operative and was wholly ineffective". Such a decision denies effect to the plain intention of the Commission, as indicated by the language of its report and order.

(3) The Court's decision proceeds from a construction of the provisions of Section 15, paragraphs (2) and (6) of the Interstate Commerce Act, which operates to defeat the intent of other provisions of the Act, including Section 1, and which works injustice to the appellant, Hoboken Manufacturers' Railroad, and will work injustice to other small railroads similarly situated.

ARGUMENT.

Statement.

In the Spring of 1926 the Hoboken was for the first time confronted with the fact that shipments of raw silk from the Pacific Coast consigned to Hoboken would arrive over its trunk line connections and that it would have to receive them from these connections and make delivery.

The joint through freight rate for the transportation of this silk was $9 per 100 pounds. The Hoboken had previously agreed with its trunk line connections that on less than carload shipments of freight the Hoboken's division of joint through freight rates should be 5¼ cents per 100 pounds. While, to the extent that the shipments were less than carloads, silk would come within this agreement, yet since the Hoboken had never previously handled raw silk under the $9 rate (R. 20), it was clearly not within the contemplation of any agreement between it and the trunk lines that the division of 5¼ cents on ordinary less than carload freight was a proper division to the Hoboken out of the $9 rate on silk. Especially was this so in view of the character and expense of the terminal services involved in handling silk. The Hoboken, by its complaint alleged that it estimated that it would cost it at least 25 cents per 100 pounds to handle the silk shipments because of the necessity for providing guards, insurance, and special switching and handling (R. 59); that immediately upon learning that shipments were shortly to move over its line, it requested its trunk line connections to agree to a compensatory division (R. 60), and that the trunk lines refused to do so, insisting that the Hoboken should receive only its division of 5¼ cents agreed to on ordinary freight. Thereupon the Hoboken filed its complaint with the Interstate Commerce Commission, asking the Commission to determine the just and reasonable division to be received by it out of the $9 rate for handling silk. This was the only practical course open to it. So long as it maintained rates on silk, it could not refuse to accept shipments when they were tendered to it. *Director General v. Viscose Co.*, 254 U. S. 498. Had it attempted to cancel its rates or its participa-

tion in the publication of the joint through rate of $9, its tariffs attempting to do so would undoubtedly have been suspended by the Commission which, following its consistent practice, would have been required to hold that the controversy as to the Hoboken's division was not a justification for cancellation of the rates. *Transit on M. K. T. R. R. Co.*, 140 I. C. C. 558; *Limestone from Illinois Points*, 74 I. C. C. 345, 348.

The evidence before the Commission showed that the actual cost to the Hoboken of handling the silk shipments exceeded 22 cents. The division of 5¼ cents agreed to on ordinary freight therefore represented but one-fourth of the Hoboken's costs of handling silk. The Commission determined that the Hoboken was entitled to a division of not less than 22 cents.

If the Commission's orders are valid in other respects, the effect of the decision of this Court holding that the first two orders of the Commission were null and void on the grounds indicated in the opinion is that the Hoboken, having followed the only course open to it to secure adequate compensation while continuing to perform its public duty, has been, by an error of the Commission as to the form of its orders, deprived of reasonable and adequate compensation and required to transport every silk shipment tendered to it from December 5, 1927, to March 10, 1930, a period of twenty-seven months, at a loss, receiving for its services only one-fourth to one-third of the cost thereby incurred by it. The record before the Commission shows that for five months alone in 1928 the difference between the division of 22 cents found reasonable by the Commission and the division paid by the trunk lines amounted to approximately $17,000 (R. 290-291). Subsequently the volume became considerably greater.

I.

The Court should reconsider its decision that the Commission's second order "was beyond the power conferred" and "was invalid".

The majority of the Court treats the second order, dated May 7, 1929, as though it were an original order under Section 15 prescribing divisions, and holds it invalid as retroactive. The Commission's report and the form of the order, however, clearly indicate that the second order was intended to be an order under Sections 16 and 16 (a) of the Act and not an original order under Section 15.

Section 16 (a) provides that the Commission may grant a rehearing, and that if after rehearing

> "it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly."

Section 16 (6) provides:

> "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

The effect of these provisions was not discussed either in the majority opinion or in the dissenting opinion, both having proceeded upon other grounds. There is nothing in the language of Sections 16 or 16 (a) indicating that the Commission lacks the powers usually possessed by a tribunal to modify or correct its orders *nunc pro tunc*. The Commission, by its first report and order having clearly indicated its intention to make the order effective for the future, it is submitted that if the first order did not so operate because of its form, the Commission had authority,

under Sections 16 and 16 (a) to modify the first order to read as it should have read when originally issued, and to carry out the Commission's clearly indicated purpose in so far as this was within its authority.

Moreover, the reasons which influenced the Court in *Brimstone Railroad & Canal Co. v. United States*, 276 U. S. 104, to hold invalid an order retroactively fixing divisions of through rates not prescribed by the Commission have no application to an order such as the second order of the Commission here.

In that case the Court said, pages 121-122:

> "Obviously a carrier may have assented to a through rate only because of the divisions accorded to it: to permit the Commission to change this arrangement as to past transactions would be exceedingly harsh if not wholly unreasonable."

Plainly the trunk lines did not publish the $9 rate in consideration of the payment of a division of only 5¼ cents to the Hoboken, since before the Hoboken began to handle the silk the trunk lines were themselves performing the terminal service at a cost of approximately 31 cents (R. 82).

Furthermore, even if the second order be considered an order prescribing divisions under Section 15 (6), it was not the sort of retroactive order indicated in that section, namely an order affecting transactions prior to the Commission's decision and dating back to the filing of the complaint. The complaint to the Commission had alleged that the trunk lines were violating Section 1 (4) of the Act by maintaining unjust and unreasonable divisions (R. 60). The Commission in its first report had determined that the division allowed was and thereafter would be unreasonable. If this determination was justified by the evidence the divi-

sion was no less unreasonable in violation of Section 1 of the Act because the effective date named in the first order was August 6, 1926, than it would have been if the order had originally specified December 5, 1927, as its effective date. The second order was designed to correct the first so as to enforce compliance with the Act in accordance with the Commission's findings, but only for the period beginning thirty days after the announcement of those findings.

We submit it was not the sort of retroactive order that is beyond the Commission's power, and that if the first order needed correction, this was accomplished by the second.

II.

The Court should reconsider its decision that the first order failed to indicate when it should take effect, as required by Section 1, paragraph 2, of the Act and "accordingly the order did not become operative and was wholly ineffective".

The majority of the Court decided that the first order, dated November 5, 1927, was inoperative because, although both the report and order indicated a clear intention to prescribe a reasonable division for the future, the Commission, following the interpretation of the statute previously observed by it (the decision of this Court in the *Brimstone* case not having yet been announced), also undertook to render its determination applicable to past shipments by providing that the order should take effect as of August 6, 1926. While the Commission admittedly erred in providing that the order should take effect on August 6, 1926, it is submitted that the order should, in its original terms and regardless of the second order, have been held a valid order as applied to the charges on future shipments. In the opinion of the Court, it is said:

"Unless and until the Commission duly designates a lawful date no carrier can know what is required and the courts cannot command obedience."

In its report, made a part of its first order, the Commission stated:

"We find that on and since August 6, 1926, the division received by the Hoboken out of joint rates on silk from points on the Pacific Coast to destinations upon its line was, *is, and for the future will be unjust and unreasonable* in that it was, *is and for the future may be* less than 22 cents per 100 pounds" (R. 211).

Its order read in part:

"It is ordered, that * * * said complainant shall receive a division of 22 cents per 100 pounds * * *."

"It is further ordered, that this order take effect as of August 6, 1926, and *shall continue in force* until the further order of the Commission" (R. 213). (Italics ours.)

There can certainly be no reasonable doubt in the minds of either the carriers or a court that what the Commission attempted to require was the application of the 22-cent division to all shipments beginning with August 6, 1926 and continuing on into the future. While the trunk lines under the statute were entitled to disregard the order as to the division of charges on shipments prior to 30 days from its date, they could not question that the Commission condemned the existing divisions currently and for the future. They were left in no uncertainty as to this.

The opinion of the Court would be appropriate in the case of an order bearing no indication as to when, if ever, it should take effect. Under such circumstances a court certainly might "not usurp the function of the Commission" of saying when its order should become effective.

But here the Commission itself in plain language indicated the transactions to which it intended that its order should be applicable. We submit that the effect of its lack of retroactive authority under the statute as interpreted in the *Brimstone* case was merely to exempt from the application of the order the division of the charges on the earlier shipments to which the Commission intended it to apply, leaving it applicable, however, to future shipments to which it was also intended to apply and as to which it was lawful. To hold that the statute operated to convert the order, clearly indicating its intent, into one containing no indication as to the transactions to which it should apply, is, we submit, to deny effect to the plain meaning of the words used. The statute did not eradicate the Commission's words. It limited the transactions as to which they were operative.

Section 15 (2), which provides that orders of the Commission

> "shall take effect within such reasonable time, not less than thirty days, * * * according as shall be prescribed in the order * * *"

does not specify how and in what form the "reasonable time * * * shall be prescribed". We submit that language which indicates beyond possibility of doubt the transactions affected is a sufficient compliance with this provision.

We submit that in construing orders of the Commission, and especially orders prescribing divisions of rates for the future, which are legislative in their character, *Terminal R. R. Assn.* v. *United States*, 266 U. S. 17, 30, *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, the same principle should be followed as is observed in construing statutes, namely, that where possible, effect should be

given to the plainly expressed intention of the Commission. *Barrett* v. *Van Pelt*, 268 U. S. 85, 90.

An order which states that it shall take effect on August 6, 1926 and remain in effect thereafter specifies as clearly that it is to be applicable to transactions on December 5, 1927 and subsequent days as if December 5, 1927 had been named in the order rather than the earlier date. Accordingly, we submit that the first order of the Commission complied with the requirement of Section 15 (2).

We agree that when the order was issued, the trunk lines would have been entitled to an injunction restraining the enforcement of the order but only as to past shipments. We submit they are entitled to no more now, that the court below erred in enjoining the first order in its entirety and that this Court should reconsider its decision affirming such a decree.

III.

The Court's decision proceeds from a construction of the provisions of Section 15 of the Act which operates to defeat the intent of other provisions of the Act, including Section 1, and which works injustice to appellant and to other railroads similarly situated.

That the statute as interpreted in the opinion of the majority, works injustice to the Hoboken is apparent, if the Commission's decision was properly supported by the record. But more than this, the effect of Section 15 as so construed, is to deprive carriers, and especially short lines, who cannot dictate rates nor withdraw from joint rates because of inadequate divisions, of the full protection which Section 1 of the Act was plainly designed to afford them in prohibiting unreasonable divisions. For, unless

the Commission has authority under Section 16 (a) to correct its orders retroactively, these carriers have no recourse from technical errors of the Commission as to the form of its orders. A shipper can secure reparation if rates are unreasonable or if the Commission has erroneously made its order in such form as not to be operative until thereafter changed. If divisions are unreasonable or the Commission makes an error as to the form of its order, the sections of the Act here discussed afford the only means of relief; and we submit should be reasonably construed with this fact in view.

Conclusion.

It is accordingly submitted that the opinion of the majority adopts a too narrow and restricted interpretation of the statute and the powers of the Commission thereunder; that as so interpreted the statute works great injustice to the Hoboken Railroad and will work injustice to other carriers similarly situated; that an opportunity should be accorded on rehearing to present further argument upon the points herein indicated, and that the judgment of the Court below be, upon further consideration, reversed.

Dated at New York, N. Y., December 22, 1931.

Respectfully submitted,

PARKER MCCOLLESTER,
Attorney for Hoboken Manufacturers' Railroad Company, Appellant.

CERTIFICATE OF COUNSEL.

I hereby certify that this petition is presented in good faith and not for delay.

PARKER MCCOLLESTER.

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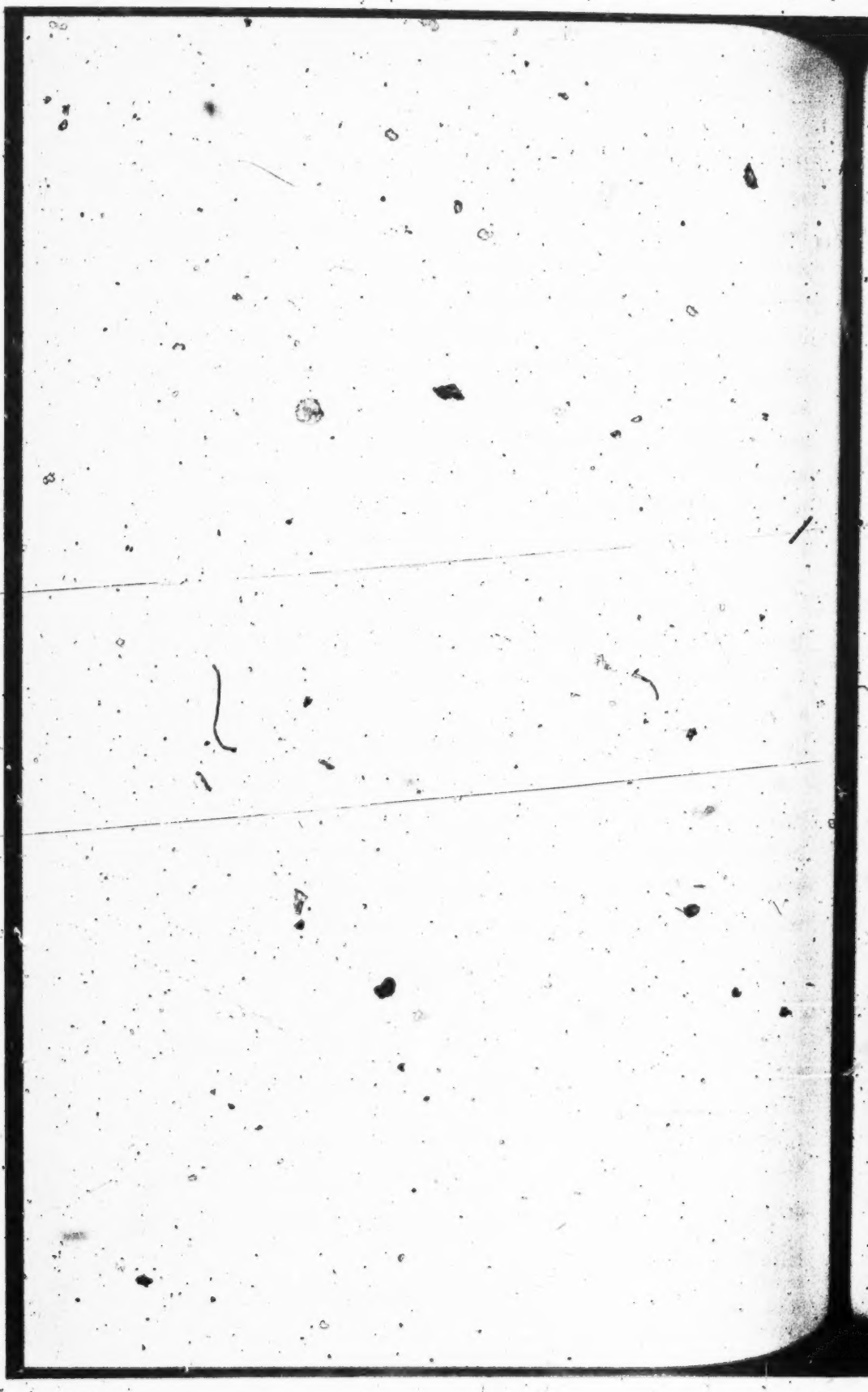

SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1931.

The United States of America, Interstate Commerce Commission, and Hoboken Manufacturers' Railroad Company, Appellants, *vs.* Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.	Appeal from the District Court of the United States for the District of New Jersey.

[November 30, 1931.]

Mr. Justice McReynolds delivered the opinion of the Court.

The appellant Railroad Company operates a mile and one-quarter of main line (with convenient sidings and terminals) along the Hoboken front, New York harbor, which connects directly with the Erie Railroad and interchanges freight with other roads through the former or by car floats. It owns locomotives and electric trucks, but no cars, and is primarily devoted to switching and terminal operations.

Prior to August 6, 1926, that Company, by agreement among the carriers, received 5.25 cents from the through rail rate of $9.00 per hundred pounds upon silk moving from Pacific coast points to destinations on its line. On that date it asked the Interstate Commerce Commission to allow a larger share. After hearing, and on November 5, 1927, the Commission found the agreed division unfair and made the following entry—

> It is ordered, That of the joint eastbound transcontinental rates on silk from points on the Pacific coast to destinations on the line of complainant, at Hoboken, N. J., said complainant shall receive a division of 22 cents per 100 pounds, which division shall be apportioned among all defendants which participate in the revenues derived from this traffic.

It is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission.

February 20, 1928, *Brimstone Railroad Co.* v. *United States*, 276 U. S. 104, was decided. We there held that before the Commission could prescribe a new division of joint rates among carriers it must carefully observe the sundry requirements set out in Sec. 15 (6), Transportation Act 1920. Also that where joint rates had been agreed on by the parties and were not "established pursuant to any finding or order" the statute confers no power to require adjustment for any period prior to final order.*

May 14, 1928, upon its own motion the Commission re-opened for further hearing the proceeding instituted by appellant. Much additional evidence was presented. A second report and order, entered May 7, 1929, again held and directed that it should

*Sec. 15, par. (6). *Commission to establish just divisions of joint rate, fares, or charges; adjustments.* Whenever, after full hearing upon complaint or upon its own initiative, the commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them or otherwise established), the commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in case where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable division thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

receive 22 cents for each hundred pounds of silk delivered to points on its line. The following is from the report—

It will be noted that the order [Nov. 5, 1927] prescribes a division from the date of the filing of the complaint, and for the future. The rate of which the division is here in issue was not "established pursuant to a finding or order of the commission," and under the holding in the *Brimstone* case, *supra*, the basis for retroactive application of the division is lacking. The order was, therefore, beyond our jurisdiction in so far as it attempted to prescribe a retroactive adjustment, but it was and is valid as to the future. Its effective date under the circumstances here present must be found to be the date upon which said order could have become effective under the act. By paragraph 2 of section 15 of the act "all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order." An order prescribing a division for the future is not an order for the payment of money. Accordingly, the original order prescribing the division for the future should have become effective on December 5, 1927.

Defendants take the position that the facts to which we are required to give consideration under section 15 (6) of the act were not present in the original record; that, therefore, the original order herein was null and void; and that any order herein must speak from the date of a final decision upon the entire record. We do not agree with this contention. The former finding as to the future division is amply supported by the evidence upon the original record.

We find that on and since December 5, 1927, the division received by complainant out of joint rates on silk from points on the Pacific coast to Hoboken, N. J., on its line has been, is, and for the future will be unjust, unreasonable, and inequitable to the extent that it has been, is, or may be less than 22 cents per 100 pounds.

An appropriate order will be entered modifying the order herein of November 5, 1927, to the extent indicated.

The second order follows—

It appearing, That on November 5, 1927, division 1 entered its report and order in the above-entitled proceeding, and that on May 14, 1928, this case was reopened for rehearing;

It further appearing, That such rehearing has been had and that the commission on the date hereof has made and filed a report on rehearing containing its findings of fact and conclusions thereon, which said report and the report and order of November 5, 1927, are hereby referred to and made a part thereof;

It is ordered, That the said order of November 5, 1927, be and it is hereby modified to read as follows:

It is ordered, That on and after December 5, 1927, said complainant shall receive a division of 22 cents per 100 pounds out of the joint eastbound transcontinental rates on silk from points on the Pacific Coast to destinations on the line of complainant at Hoboken, N. J., which division shall be apportioned among all defendants which participate in the revenues derived from this traffic east of Chicago and Peoria, Ill., St. Louis, Mo., and related gateways,

And it is further ordered, That this order shall continue in force until the further order of the commission.

The appellees refused to obey the May 7th order and upon motion, February 4, 1930, the Commission entered a third directing an allowance of not less than 22 cents per hundred pounds on shipments on and after March 10th. Also that "this order shall not be construed as modifying, amending or rescinding said orders of November 5, 1927, and May 7, 1929, in so far as they relate to and determine the matters in controversy in this proceeding or the rights of the parties hereto prior to March 10, 1930, or with respect to the division of rates on any shipment delivered to or transported by complainant prior to said date."

March 11, 1930, by petition in the United States District Court for New Jersey appellees challenged the three orders above mentioned and asked that each be declared ineffective. The cause was duly heard and determined, three judges sitting.

Of the Commission's final action the court said—"This [third] order, we understand, is accepted by the plaintiffs because of the fact that it becomes effective not less than forty days after its entry." Relief in respect of it was accordingly denied. As this

part of the decree is not now challenged, we need not further consider the effect of that order.

Relying upon *Brimstone Railroad Co.* v. *United States, supra,* the court held that the evidence presented to the Commission prior to November 5, 1927, did not meet the statutory requirements. And upon that ground, as well as because of its retroactive feature, the first order was declared ineffective. The court further declared that in view of the additional testimony introduced subsequent to the re-opening on May 5, 1928, the second order might have been lawful but for the retroactive provision; this rendered the whole invalid.

As the cause will be decided upon another point, we need not inquire whether there was proper consideration of the sundry elements enumerated in Sec. 15 (6), Transportation Act 1920, prior to the first order. The applicable rule was definitely pointed out by *Brimstone Railroad Co.* v. *United States, supra.* The court below was of opinion that the statutory requirements were not met; and the Commission's own action in re-opening the proceedings indicates rather plainly that it then accepted the same view.

Sec. 15, par. (2), Transportation Act, provides that "all orders of the commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction."

The only provision in the first order in respect of the effective date is this—"It is further ordered, That this order take effect as of August 6, 1926, and shall continue in force until the further order of the commission." The Commission had no power to put this order into effect as of a prior day; no future day was prescribed; the designated date was not a lawful one. Accordingly, the order did not become operative and was wholly ineffective.

"Orders . . . shall take effect . . . according as shall be prescribed in the order." The courts may not usurp the function of the Commission and say one of its orders shall become effective thirty days, a hundred days, or at any other time after entry. An order must take effect as prescribed; its effective date,

if any, is the one actually appointed not one which might have been. Unless and until the Commission duly designates a lawful date no carrier can know what is required and the courts can not command obedience. It follows that, notwithstanding the first order, the agreed division of the through rate continued to be the lawful one.

Under the guise of putting a former one into effect, the second order likewise undertook retrospectively to change an existing agreed rate. This was beyond the power conferred. The order was not divisible; it specified no lawful date upon which it should become effective and was invalid. The division as originally agreed by the carriers remained the lawful one.

The third order appointed a definite time, as the statute requires not less than thirty days after entry, upon which it should go into effect; it also definitely stated that nothing therein should be construed as modifying, amending, or rescinding the previous ones. Appellees do not question its validity.

The decree of the court below is affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 33.—October Term, 1931.

The United States of America, Interstate Commerce Commission, and Hoboken Manufacturers' Railroad Company, Appellants, *vs.* Baltimore and Ohio Railroad Company, The Central Railroad Company of New Jersey, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.	Appeal from the District Court of the United States for the District of New Jersey.

[November 30, 1931.]

Mr. Justice Stone.

The first order of the Commission, without regard to its later ones, should, I think, be held valid and operative thirty days from its date. Dated November 5, 1927, it directed that the "complainant shall receive a division of 22¢ per hundred pounds" of the joint rate on silk from Pacific coast points to destinations on its line. It specified that it should take effect as of an earlier date, August 6, 1926, "and shall continue in force until the further order of the Commission." For present purposes, we must assume that it was supported by evidence and was intended to remove a division of the joint rate, which was grossly unfair to appellant.

The Commission, as this Court later decided in *Brimstone Railroad & Canal Co.* v. *The United States*, 276 U. S. 104, was without authority to order a division of rates as to the past, but it did possess the power to order a division for the future, and sought, by an unambiguous use of words, to exercise it. Yet, it is held by the Court that the order is invalid in its entirety and, in consequence, the appellants lose the benefit of it, not only for the designated period antedating the Commission's action, but for the four years which have since elapsed, because the order did not, as required by § 15 (2) of the Transportation Act of 1920, prescribe a time at least thirty days from its date when it was to take effect. The section provides that orders of the Commission "shall

take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order or for a specified period of time, according as shall be prescribed by the order." On its face the statute would seem merely to curtail the power of the Commission to make its order effective within thirty days, rather than to require the order to specify some particular date beyond the thirty day period when it should be effective.

But granting that the latter is the requirement of the statute, I fail to perceive in the present order any such failure to specify the time of its operation as would render it invalid as to the division which the Commission had power to make. It would not, I think, occur to anyone unfamiliar with legal niceties that the order failed to prescribe a time for its operation with respect to the future. It bore a date and in terms said that the division ordered should take effect as of an earlier named date and should continue in force until further order of the Commission. Thus the order prescribed that it should operate in the future as well as in the past, on the 31st and future days as well as on the 30th and each earlier day after its date. In view of the nature of the subject matter, the removal of an unjust apportionment of a through rate, it cannot be said that the Commission did not intend it to operate on the 31st and later days, even though it should turn out that there was a lack of power to order the division as to earlier dates. See *United States* v. *Chicago, M., St. P. & P. Railroad Co.*, 282 U. S. 304.

But it is said, in effect, that since the order is void so far as applied to a past period, identified by named dates, that part of it is as though it had never been written and, hence, the order when applied to the future must be read as though it specified no time for its operation. But the mere fact that the Commission commanded, in a single writing, some things which were beyond its power, together with others that were not, could not erase from the document either the dates or the words or change their meaning or preclude our looking at them to see in what manner and to what extent the Commission exercised the power it did possess. Looking at the words I cannot say that the order, in so far as it directed the division after thirty days from its date, did not comply with § 15 (2), or that it can rightly be set at naught regardless of the nature and amount of the evidence supporting it.

Mr, Justice HOLMES and Mr. Justice BRANDEIS concur in this opinion.